

**LEGAL PROTECTION OF FRANCHISOR TRADE SECRET  
IN FRANCHISE AND WORK AGREEMENT**

**A BACHELOR DEGREE THESIS**



Arranged By:

**Muhammad Faishal Al Fadhil**

Student Number: 16410546

**INTERNATIONAL PROGRAM  
FACULTY OF LAW  
UNIVERSITAS ISLAM INDONESIA  
YOGYAKARTA**

**2020**

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IN FRANCHISE AND WORK AGREEMENT**

**A BACHELOR DEGREE THESIS**

Presented as the Partial Fulfillment of Requirement to Obtain Bachelor's Degree

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Universitas Islam Indonesia

Yogyakarta



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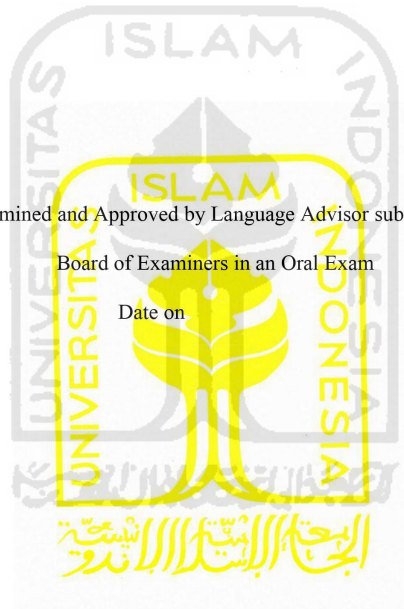
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YOGYAKARTA**

**2020**

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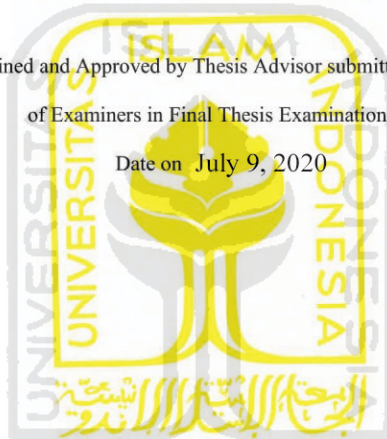
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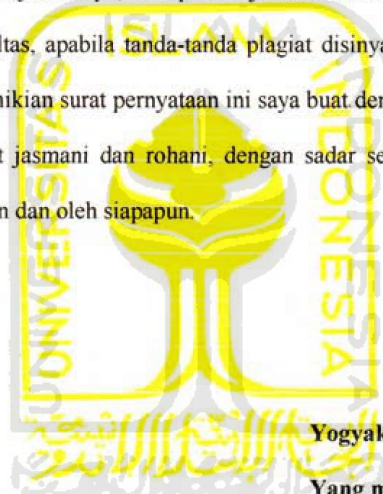
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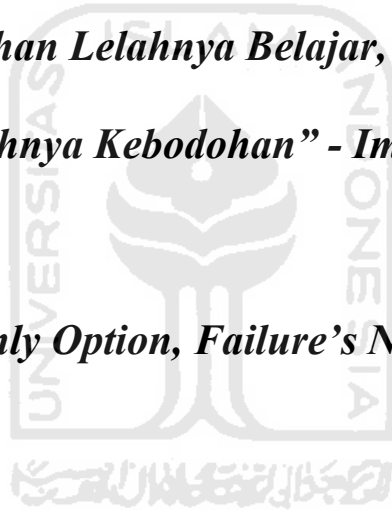
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## MOTTO

***“Dan Siapa Yang Tidak Belajar Di Masa Mudanya,  
Bertakbirlah Empat Kali (Sebagai Shalat Jenazah) atas  
Kematiannya” - Imam Syafi’i***

***“Bila Kau Tak Tahan Lelahnya Belajar, Maka Kau Harus  
Tahan Perihnya Kebodohan” - Imam Syafi’i***

***“Succes Is My Only Option, Failure’s Not” - Slim Shady***



## DEDICATION



*With gratitude to Allah S.W.T.,  
the author dedicates this thesis to:  
Ayah, Ibu, and all of my family  
who always support me and pray for me...*

*all of my best friends wherever you are, thank you  
for the support, inspiration and prayer for me while  
in Yogyakarta until my thesis is finished...*

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## ABSTRACT

The purpose of this study is to understand the legal consequences of violation of the trade secret and the concept of protection trade secret in franchise and work agreement and how to protect it. The research method used in this study is a normative legal research. Data analysis in this study was carried out by qualitative methods and the research approach is the juridical/statutory approach method, which is an approach that is carried out by analyzing related laws, verdict and regulations.

The results of this study show that the legal consequences of violation of franchisor's trade secret are the consequences of criminal charges, the consequences of civil lawsuit and the consequences of unfair business competition in which all three can be submitted to the court or other authorized institutions. Furthermore, the legal protection of the franchisor's trade secrets in the work and franchise agreement is divided into two protections namely preventive and repressive . Preventive protection can be in the form of addition non-disclosure clause, non-competition clause, non-solicitation clause and supervision clause in franchise agreement while non-disclosure clause, non-competition clause, and non-solicitation clause in work agreement. In addition, apart from agreement, preventive trade secret protection can be in the form of giving a semi-finished recipe if the franchise is engaged in food and beverage field. Meanwhile, in the context of repressive legal protection can be done with a criminal charge to the organ of the franchisee company and civil lawsuit for compensation or termination of an act.

*Keywords: Trade Secret, Franchise, Agreement*

# CHAPTER I

## INTRODUCTION

### A. CONTEXT OF STUDY

Franchise business is a future business trend with a small risk of failure where growth rapidly. The popularity of franchise businesses as a way of marketing and distributing goods and services is increasing. As an effective marketing system, the existence of a franchise is considered capable of reaching the market target of a type of product throughout Indonesia.<sup>1</sup>

Based on article 3 Government Regulation Number 42 of 2007 concerning franchising (hereinafter called as Government Regulation Number 42 Of 2007) states that franchise businesses must fulfil the following criteria:

- a. has business characteristics;
- b. proven to provide benefits;
- c. have a standard for services and goods and/or services offered that are made in writing;
- d. easy to teach and apply;
- e. continuous support; and
- f. Intellectual Property Rights that have been registered.

Then, Franchise business characteristic is a business with a royalty and fee sharing system between the parties in which the franchisee who uses a trademark or other IPR of the franchisor is required to fulfill various performance and SOP submitted by the franchisor in order to maintain the originality and distinctiveness

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<sup>1</sup> Arifa'I, *Proposal Bisnis, Personal Franchise ( Waralaba Pribadi ) Bentuk Usaha Alternatif Menjadi Jutawan Dalam Waktu Relatif Singkat*, L4L Press, Surakarta, 2004, P. 56

of the business. In addition, one of the criteria above mentions that Intellectual Property Rights (IPR) as one of the most important aspect related to the franchise business.

In international level, international regulation in the Uruguay Round of agreements in Marrakech, the Indonesian government agreed to sign a Trade Related Aspects of Intellectual Property Rights Agreement (hereinafter refer to TRIPs Agreement)<sup>2</sup> which regulates internationally accepted standard norms regarding Intellectual Property Rights (IPR)<sup>3</sup>.

Conventionally, IPR is divided into (2) two parts:<sup>4</sup>

1. Copyright;
2. Industrial property rights, including:
  - patent
  - industrial design
  - trademark
  - repression of unfair competition
  - layout design of integrated circuit
  - trade secret.

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<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPs Agreement], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

<sup>3</sup> In Indonesia, for the first time the term Intellectual Property Rights (IPR) was used as the equivalent term in Law Number 7 of 1994 concerning Ratification of the Agreement Establishing the World Trade Organization used in various laws governing the types of intellectual property rights along with regulations its implementation was ratified in the period of the late 1980s to the end of the 1990s then in its development since 2000 based on the Decree of the Minister of Justice Number M.03.PR.07.10 of 2000 and also with the approval of the State Minister for Administrative Reform No.24 / M / PAN / 1/2000 stipulates the use of the term Intellectual Property Rights (IPR).

<sup>4</sup> Direktorat Jenderal Hak Kekayaan Intelektual, Departemen Kehakiman dan Hak Asasi Manusia R.I., *Buku Panduan Hak Kekayaan Intelektual* (Tangerang: DJHKI, 2003), P. 3.

The rationale for protecting trade secret under TRIPs agreement is the same as the rationale for protecting other forms of IPR, to ensure that those who invest to develop concepts, ideas and information of commercial value can benefit from the investment,<sup>5</sup> by obtaining exclusive rights to use the concept or information, or to prevent others from using it or disclosing it without permission.

Generally, The law can protect trade secrets of Franchisor in TRIPs Agreement if the information disclosed implies confidentiality.<sup>6</sup> For example, if it was disclosed under circumstances where the recipient knew or ought to have known that the information was disclosed for a limited purpose and was used for a purpose other than that for which it was disclosed.<sup>7</sup>

In Indonesia, the franchise business has made a positive contribution to the national economy, keeping the economy in the middle of an economic downturn. Based on data from the Director General of Domestic Trade at the Ministry of Trade in 2016, in Indonesia there were 698 franchises with 24,400 outlets consisting of 63% local franchises and 37% foreign franchises.<sup>8</sup> With a turnover of IDR 172 trillion, the franchise industry in Indonesia itself will continue to grow along with the develop innovations made by industry players in that sector.

However, along with the development of the franchise business in Indonesia, franchisors or franchisees often do not pay attention to the intellectual property

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<sup>5</sup> Kitch, E.W. (1980), "The Law and Economics of Rights in Valuable Information," 9 Journal of Legal Studies, 683. Another seminal article

<sup>6</sup> Risch, Michael, "Why Do We Have Trade Secrets?". Marquette Intellectual Property Law Review, Vol. 11, p. 1, Winter 2007. Available at SSRN: <https://ssrn.com/abstract=885778>. Rich states that trade secrets are "*justified by the economic benefits that flow from their existence, most notably incentives for businesses to spend less money protecting secret information or attempting to appropriate secret information.*" at 5.

<sup>7</sup> Lac Minerals Ltd. v. Apotex Inc., [1992] 44 C.P.R. (3d) 289, 296-99 (SCC).

<sup>8</sup> <http://www.kemendag.go.id/id/news/2016/09/06/ri-punya-698-waralaba-omzetnya-rp-172-t>, (Accesed September 25, 2019)

contained in the franchise business, such as protection of trade secrets. In fact, aspects of intellectual property such as trade secrets are the most important aspects of the business.

Practically, running a franchise business must use a written contract between the two parties. In line with Rapid franchise business development it has led to various forms of agreements. Agreements are a means of binding rights and obligations<sup>9</sup> between employers and workers or between franchisor and franchisee. One function of the agreement is to guarantee the protection of trade secret of a franchise business<sup>10</sup>. If the leaked information occurs, it will result in loss of a company. Franchisors should ensure that techniques, formulas, recipes, processes and compilations of technical information are not revealed to competitors.

For instance, in 2014 there was verdict by the court<sup>11</sup> in case of Komala restaurant who engaged in culinary business, one of the big franchises whose parent is in Singapore. Komala restaurant as a franchisor in its agreement with PT Graha Bhakti Semesta (hereinafter called as GBS) basically when the contract expires, GBS may not compete in the same business for 24 (twenty four) months after the franchise agreement expires. However, not long after 24 (twenty four) months since the end of the Komala franchise agreement, GBS changed the name of the Komala Restaurant to a Vegetarian Restaurant and continued to use the Komala Restaurant system such as serving food that is typical of Komala

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<sup>9</sup> Subekti, R, *Aspek-aspek Hukum Perikatan Nasional*, Citra Aditya Bakti, 1989, Jakarta, P. 15.

<sup>10</sup> Orly Lobel, "The DTSA and the New Secrecy Ecology" 12 (Bus., Entrepreneurship, & Tax Law Review, Research Paper No. 17-317, 2017), <https://papers.ssrn.com/sol3/papers.cfm?>

<sup>11</sup> Putusan Pengadilan Negeri Jakarta Utara Nomor 413/Pdt.G/2014/PN.JKT.UTR.

Restaurant, namely vegetarian food, the method of implementation , marketing, promotion and methods of the komala restaurant system in running the restaurant outlets.

Even though, in the verdict, the judge stated that the dispute was not a relative authority of the North Jakarta District Court because in the agreement it was stated that the choice of law and the forum were in Singapore. However, it can be concluded that there has been a violation of trade secrets committed by the GBS in the main matter.

In addition to franchise agreements, violations of trade secrets are also often carried out by employees of franchise companies in work agreements, such as the Bekasi District Court Decision Number: 202 / Pdt.G / PN / Bks regarding tort between PT. Aneka Harapan Realindo as Ray White Harapan Indah Bekasi (Plaintiff) franchiser against its employees.

In that case the plaintiff's employee was sued for using the plaintiff's trade secrets in the form of executive listing and open listing. In addition, the plaintiff's employees also compete in the same business, which in the work agreement there is a prohibition not to compete in a certain period of time

Finally, the judge decided that the plaintiff's claim was unacceptable (N.O) on the grounds in which the plaintiff did not have the capacity to file because in fact the plaintiff was a franchisee rather than a franchisor and should have filed a lawsuit in the case was the franchisor. In that case, there is a legal event that the potential breach of the franchisor's trade secrets not only occurs in the franchise agreement, but also in the work agreement.

In line with Indonesia Law Number 30 of 2000 on Trade Secret (hereinafter mention as Law Number 30 of 2000) the trade secret of Komala Restaurant and PT. Aneka Harapan Realindo has fulfill the element article 3 (1) Law Number 30 of 2000 which explain the trade secret characteristic are:

1. The information includes technology or business commercial
2. Information that is not publicly known
3. Has economic value that is useful in business activities
4. Confidentiality is maintained by the owner.

So, the trade secret of those company need to be protected.

Moreover, Article 13 of Law Number 30 of 2000 states that Trade Secret Violations occur when someone deliberately discloses Trade Secrets, breaks agreements or denies written or unwritten obligations to safeguard the relevant Trade Secrets. Whereas Article 14 emphasizes that a person is considered to violate another party's Trade Secrets if he obtains or controls the Trade Secrets in a manner that is contrary to the applicable laws and regulations.

In the above case it is important to identify whether a secret fulfill the qualifications of trade secret as referred to in the law and whether the consequences of violation of the trade secret, both violations in the context of the franchise agreement and violations in the context of the work agreement.

Afterwards, knowing how the consequences of violating trade secrets. then, what are the repressive legal protection measures through criminal prosecution and / or civil lawsuits, as well as preventively in the formulation of an agreement



between the franchisor, franchisee and employee in order to protect the franchisor's trade secrets. This is why it is so urgent to conduct this research.

## **B. PROBLEM FORMULATION**

1. How are the Legal Consequences of Violation of Trade Secret by Franchisee and Ex Employee ?
2. How are the Legal Protection of the Franchisor's Trade Secret in Franchise Agreement ?
3. How are the Legal Protection of the Franchisor's Trade Secret in Work Agreement

## **C. PURPOSE OF STUDY**

The purpose of this thesis:

1. To understand the Legal Consequences of Violation of the Trade Secret
2. To understand the concept of protection of trade secret in franchise agreement and how to protect it
3. To understand the concept of protection of trade secret in work agreement and how to protect it

## **D. TERMS AND DEFINITION**

### **1. Trade Secret**

Based on Law Number 30 of 2000 on Trade Secrets (hereinafter referred to as Law Number 30 of 2000), in Article 1 number (1) defines trade secrets as information that is not known to the public in the field of technology and / or business, has economic value because it is useful in business activities, and has been maintained confidentiality by the owner of trade secrets. Meanwhile, in Section 7: *Protection of Undisclosed Information* in TRIPs in article 39 clause (2) states that trade secret is information that has the following characteristics:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*
- (b) has commercial value because it is secret; and*
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*

### **2. Franchise**

Based on Government Regulation Number 42 of 2007 on Franchise. In Article 1 number (1) explains that: "Franchise is a special right owned by an individual or business entity to a business system with business characteristics in order to market goods and / or services that have been proven successful and can be utilized and / or used by other parties based on franchise agreements. "

Meanwhile, according to the International Franchise Association, the franchise is explained as follows:<sup>12</sup>

*“A franchise operation is a contractual relationship between the franchisor and franchisee in which the franchisor offers or is obligated to maintain a continuing interest in the business of the franchisee operates under a common trade name, format and/or procedure owned or controlled by the franchisor, and in which the franchisee has or will make a substantial capital investment in his business from his own resources”*

#### **E. RESEARCH ORIGINALITY**

To find out the originality of the research that the researcher conducted, in this case the previous research will be included in one theme. Research in the form of scientific work is carried out by the following academics:

1. Research conducted by Syahriyah Semaun with the title *“Perlindungan Hukum Terhadap Rahasia Dagang”*, This research use normative legal research, the type of writings is Journal and, in its conclusion explains the legal protection relating to trade secrets in general. While the research writer specifically examines the legal protection of trade secret as specific as franchise agreement and work agreement.

2. Research conducted by Cindy Margaretha Situngkir with the title *“Perjanjian Rahasia Dagang Dalam Bisnis Pizza”* This research uses normative legal research, the type of writings is Thesis, the problem formulation of this research is 1. What criteria for information are considered trade secrets? 2. What are the

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<sup>12</sup> Martin Mandelson, *The Guide To Franchising*, (Oxford: Pergamon Press, 1986), P.6

rights and obligations of the parties in the trade secret agreement in the pizza business? and 3. What is the remedy if there is a violation of the trade secret agreement? which in its conclusion explains the legal protection relating to pizza business trade secrets and recommends to socialize trade secret laws and revise the legal rules relating to trade secrets to protect them. Meanwhile, the author's research examines the legal protection of the trade secrets franchise business (not focus on pizza business) and also the author's research more focus on agreement, both franchise and work agreement.

3. Research conducted by Tommy Ricky Rosandy with the title "*Perlindungan Rahasia Dagang Perusahaan Niela Sary , Kaitannya Dengan Kewajiban Karyawan*", This research use normative legal research, the type of writings is Thesis, the problem formulation of this research is 1. How are the legal steps from the owner of the trade secret food company Niela Sary to be protected as Trade Secret? and 2. What is the legal consequence of the use of trade secrets by former employees who did not authorize the owner of the trade secret food company Niela Sary?, which in its conclusion explains the legal protection of restaurant trade secrets in form of non-franchise business while In the author's research, the object of the research is a franchise business, then, the focus of the problem is franchise agreement and work agreement. not only discuss the problem in terms of the work agreement.

4. Research conducted by Yana Daluchi Somkenechi Madubuko with the title *"The protection of Trade Secrets: A Comparative analysis of the United States and the European Union."* This research use normative legal research, the type of writings is Thesis, The aim of this thesis is to compare both systems of protection (available in the European Union and the United States of America), point out the differences and similarities between the two and finally settle on which provides the most adequate system of protection for confidential commercial information, which in his research explained the system of legal protection of trade secrets in the European Union and the United States of America in terms of both civil and criminal liability. Meanwhile, the author's research focuses more on the protection of trade law secrets in Indonesia.

5. Research conducted by Bella Katrinasari and Hernawan Hadi, with the title *"Tinjauan Hukum Terhadap Wanprestasi Royalty Rahasia Dagang Dalam Perjanjian Waralaba"* specifically about the protection of the Komala Trade Secret Law of the restaurant franchise agreement. In this study, it is more focused on analyzing a case based on the contract defaults. While the research author explains the trade secret law will protected through franchise and work agreement. This conclusion research also became a supporting data of author research. This research use normative legal research, the type of writings is Thesis.

6. Research conducted by Anik Tri Haryani with the title *"Perlindungan Hukum Haki Dalam Perjanjian Waralaba"* This research uses normative legal research,

the type of writings is journal, the problem formulation of this research is 1. What is the legal protection of trade secret owners in a franchise agreement? and 2. What are the legal consequences if there is a violation of trade secrets in the franchise agreement ?. In this research discusses and concludes the protection of intellectual property rights in the franchise business. Meanwhile, in the study the authors only examine the protection of intellectual property rights in the context of trade secrets.

For more explanations will explain as follows:

No	PREVIOUS RESEARCH	DIFFERENCES
1	Syahriyah Semaun, who did research about <i>“Perlindungan Hukum Terhadap Rahasia Dagang”</i> January, 2011. In his research focuses on the legal protection of trade secrets in general. <sup>13</sup>	The differences difference is that it is focused on the legal protection of trade secret as specific as franchise agreement and work agreement.
2	Cindy Margaretha Situngkir, who did research about <i>“Perjanjian Rahasia Dagang Dalam Bisnis Pizza”</i> April, 2017. In his research specifically focused on protecting trade secrets in the pizza business. Furthermore, the advice presented in his research is the socialization of the trade secret law to business actors and requesting that the Indonesian government	The difference is that it is focused on protecting the trade secret of the franchisor in the restaurant franchise business in general, which means not only discussing the pizza business specifically. In the research, the researcher will not only give advice such as the socialization of

<sup>13</sup> Syahriyah Semaun, “Perlindungan Hukum Terhadap Rahasia Dagang,” - DIKTUM: Jurnal Syariah dan Hukum Volume 9, Nomor 1, 2011

	prepare special rules for the protection of trade secrets after the termination of the work agreement. <sup>14</sup>	the trade secret law toward business actors and the revision of labor law in protecting trade secrets after the work agreement ends. However, more broadly that includes the franchise agreement itself.
3	Tommy Ricky Rosandy who did research about “ <i>Perlindungan Rahasia Dagang Perusahaan Niela Sary , Kaitannya Dengan Kewajiban Karyawan</i> ”, 10 Mei 2012. In his research explained the protection of trade secrets in the context of food companies (non-franchise) so that the problem is more focused on former employees who violate trade secrets in the form of unauthorized use of some types of food recipes in companies that result in the leakage of some of the food recipes so that it is known by other parties and resulting in the cancellation of protection of trade secrets for recipes that have been leaked because the element of confidentiality is no longer fulfilled. <sup>15</sup>	The difference is the object of the research in is a franchise business, then, the researcher focus of the problem is franchise agreement and work agreement. not only discuss the problem in terms of the work agreement.
4	Yana Daluchi Somkenechi Madubuko, who conducted a research about “The protection	The distinguishes author research from the research conducted by

<sup>14</sup> Cindy Margaretha Situngkir, “Perjanjian Rahasia Dagang Dalam Bisnis Pizza,” April 2017, <http://digilib.unila.ac.id/26554/2/SKRIPSI%20TANPA%20BAB%20PEMBAHASAN.pdf> (Accessed September 25, 2019)

<sup>15</sup> Tommy Ricky Rosandy, “Perlindungan Rahasia Dagang Perusahaan Niela Sary ,Kaitannya Dengan Kewajiban Karyawan,”” may, 10 2012. <https://dspace.uui.ac.id/bitstream/handle/123456789/8538/RTB%20519.pdf?sequence=1&isAllowed=y> (Accessed September 25, 2019)

	<p>of Trade Secrets: A Comparative analysis of the United States and the European Union.” Tallin, 2018. As conclusion, this thesis has examined the systems of trade secret protection in the United States of America and the European Union in terms of both civil and criminal liability, comparing their respective aspects in order to expose their main differences. The European Union up until recently did not deem the issue of trade secret misappropriation as important to legislate on a Union-wide level, leaving it to the states. It is clear that the US on the other hand recognized the importance of safeguarding trade secrets and implemented it in legislation from an early stage in order to protect the trade secret itself.<sup>16</sup></p>	<p>Daluchi Somkenechi Madubuko is that author research focuses more on the protection of trade secret law in Indonesia, but some foreign references (outside Indonesian perspective / law) are only as supporting data and analysis in protecting trade secret laws in Indonesia.</p>
5	<p>Bella Katrinasari, Hernawan Hadi, “<i>Tinjauan Hukum Terhadap Wanprestasi Royalti Rahasia Dagang Dalam Perjanjian Waralaba</i>” Juni 2017. This research discusses how to protect trade secrets when the contract term expires and discusses how the legal consequences arises if one party violates the agreement or defaults on the Komala restaurant franchise agreement. In this study more focused on analyzing a case</p>	<p>The difference between the research of Bella Katrinasari and Hernawan Hadi is focuses on the breach of contract such as royalty, fee, etc in the agreement, and explain the trade secret law limited to the franchise agreement. while the author research explains the trade secret law will protected through</p>

<sup>16</sup> Yana Daluchi Somkenechi Madubuko, “*The protection of Trade Secrets: A Comparative analysis of the United States and the European Union.*” 2018, Tallinn Univeristy Of Tehcnology, School of Business and Governance Department of Law thesis, <https://digi.lib.ttu.ee/i/file.php?DLID=10108&t=1>



	based on the contract defaults. Whereas the trade secret law is only used to define the meaning and scope of trade secrets. <sup>17</sup>	franchise and work agreement. This conclusion research also became a supporting data of author research.
6	Anik Tri Haryani, “ <i>Perlindungan Hukum Haki Dalam Perjanjian Waralaba</i> ” Maret 2017. In his research explained that the franchise agreement is one aspect of legal protection for the parties from acts detrimental to other parties, including providing legal protection against IPR. This is because the agreement can be a strong legal basis for enforcing legal protection for the parties involved in the franchise system. If one party violates the contents of the agreement, the other party can sue the violating party in accordance with applicable law. However, in this research the discussion is more focused on IPR legal protection efforts in general such as patent, industrial design, trademark, and of course trade secret in franchise agreement. <sup>18</sup>	As for this research, it explains specifically the protection of IPR in the scope of trade secrets in the franchise business.

<sup>17</sup> Bella Katrinasari, hernawan hadi, “*Tinjauan Hukum Terhadap Wanprestasi Royalty Rahasia Dagang Dalam Perjanjian Waralaba*” Privat Law Vol. V No. 1 Januari-Juni 2017, P 92.

<sup>18</sup> Anik Tri Haryani, “*Perlindungan Hukum Haki Dalam Perjanjian Waralaba*” Yustisia Merdeka: Jurnal Imiah Hukum; ISSN: 2407-8778, vol 4 number 2. Maret 2017.

## **F. LITERATUR REVIEW**

### **1. Trade Secret**

#### **a. Trade Secret in General**

Juridical foundation of trade secrets contained in Law Number 30 of 2000, which is the background of this law in order to advance an industry that is able to compete in the scope of national and international trade, is required to guarantee the protection of trade secrets, especially from fraudulent business competition acts.<sup>19</sup>

The regulation of trade secrets in Article 1 (1) defines trade secrets as information that is not known by the public in the field of technology and / or business, has economic value because it is useful in business activities, and has been kept confidential by the owner of trade secrets.

Based on the elements stipulated in the definition of trade secrets, it can be concluded that the legal characteristics of trade secrets are:<sup>20</sup>

- 1) Information that is not publicly known
- 2) The information includes technology or business
- 3) Has economic value that is useful in business activities
- 4) Confidentiality is maintained by the owner.

#### **b. Advantages and Disadvantage of Trade Secret Protection**

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<sup>19</sup> Budi Agus Riswandi dan M. Syamsudin, *Hak Kekayaan Intelektual dan Budaya Hukum*, Cetakan Kedua (Jakarta: PT. Raja Grafindo Persada, 2005), P 63.

<sup>20</sup> OK. Saidin, *Aspek Hukum Kekayaan Intelektual*, Cet. 7, (Jakarta: PT. RajaGrafinndo Persada, 2010), P.452-453

a. Advantages<sup>21</sup>

- 1) "Compared to the patent protection period which is only 20 years, protection through trade secrets is more beneficial because the time period is unlimited. For discoveries and formulas in the field of trade production this period becomes so important because if protected with a Patent then after that time period expires, information will become public property and everyone can access it without fear of violating IPR, while the information itself is one of the strategic potentials that should be maintained to be able to compete with competitors. Through a system of trade secret protection, the information can be protected continuously and the right remains with the owner. Trade secrets often do not meet patent requirements. Besides that, it is also necessary to meet the conditions such as there must be an element of novelty, and can be applied in the industry.
- 2) Through the trade secret protection system, all important information of the company will be kept confidential, because the information will remain closed, it is very important considering that disclosure of information can be utilized by competitors to make the same product.
- 3) In the patent law system only the first inventor can register his patent, but in trade secrets this is not regulated, which means that at all times people can keep their trade secrets and protect their rights from interference from others, regardless of whether others also have similar information.
- 4) In terms of costs, protection of inventions through trade secrets is relatively cheaper compared to patents, because there is no need to issue annual fees and costs related to registration formalities as is the case with patents. This is one of the factors considered by the inventor.
- 5) Factually, there are things that cannot be protected by patents, but instead can be protected by trade secrets, such as customer lists, forms, and others. Business information often does not qualify for patent protection, for several reasons such as not containing inventive steps, possible similarities with other inventors and so on. "

b. Disadvantages<sup>22</sup>

- 1) "Trade secrets may also be discovered by third parties as competitors.
- 2) Efforts to protect trade secrets can affect productivity because of the very strict protection system that requires very neat methods

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<sup>21</sup> Ahmad Ramli., *Teori Dasar Perlindungan Rahasia Dagang*. Bandung : Mandar Maju, 2000.P.79

<sup>22</sup> Ahmad Ramli., Op., cit P.81

- including in the context of company relations with employees. This can affect the success of manufacturing, due to the loss of additional benefits that should be obtained because of this protection system.
- 3) Protection of trade secrets will only last as long as the secrecy is properly maintained, once the secret is published by the owner, there will be no more protection. Therefore, a trade secret owner must incur ongoing costs and energy to protect the information he owns. , with another understanding that the responsibility for protection is entirely left to the owner of the information. This is different from patents which do not impose similar obligations because the constitutive system has directly protected the owner even though the patent has been published. "

## 2. Franchise

Based on Government Regulation Number 42 of 2007<sup>23</sup>, especially in Article 1 number (1) explains that: "Franchise is a special right owned by an individual or business entity to a business system with business characteristics in order to market goods and / or services that have been proven successful and can be utilized and / or used by another party based on a franchise agreement.

The requirements to be considered as a franchise are listed in Article 3 Government Regulations No. 42 of 2007 which states that "Franchising must have the following criteria:

- a. has business characteristics;
- b. proven to provide benefits;
- c. have a standard for services and goods and / or services offered that are made in writing;
- d. easy to teach and apply;

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<sup>23</sup> Peraturan Pemerintah Nomor 42 Tahun 2007 tentang Waralaba

- e. ongoing support; and
- f. Registered Intellectual Property Rights.

### 3. Contract

#### a. Contract in General

The contract is regulated in Book III of the Civil Code on engagement. Subekti gives the definition of agreement as an event where someone promises to another person where the two people (parties) promise each other to do something.<sup>24</sup> In the Civil Code, also stipulated the legal conditions of an agreement. In Article 1320 of the Civil Code it is said that for agreements to be valid, four conditions are required:

1. mutual agreement;
2. the ability to make an engagement;
3. a certain thing (object);
4. a lawful cause

In the franchise agreement, the franchisor and the franchisee must fulfill the elements in 1320, when the legal conditions of the agreement (subjective and objective) have been fulfilled then a right and obligation will arise for both parties.<sup>25</sup> Furthermore, franchise agreements basically include anonymous agreements (innominaat) as regulated in Article 1319 of the Civil Code which states that all agreements, whether or not they have a special name, or are not known by a certain name, are subject to the

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<sup>24</sup> R. Subekti, *Hukum Perjanjian*, Cet. 20, (Jakarta: PT. Intermasa, 2004). P. 1

<sup>25</sup> Sudikno Mertokusumo, *Mengenal Hukum*, Penerbit Liberty, Yogyakarta, 1985, P.6.

general rules contained in the chapter about engagements that are born from contracts or agreements and chapters on general engagements.

In the development of the doctrine of the law, there are three elements in the agreement which are in essence an embodiment of the principle of freedom of contract. The principle of freedom of contract itself can be analyzed based on the provisions of Article 1338 paragraph (1) of the Civil Code, stated that: "All treaties made legally apply as a law for those who make them". The three elements are as follows:<sup>26</sup>

a. Essential Essence

The essential element is an element that must be in a contract because without an agreement about this element, there is no contract.

b. Naturalia Elements

The naturalia element is an element that has been regulated in the law so that if it is not regulated by the parties in the contract, the law governs it. Thus, the naturalia element is an element that is always considered to be in the contract.

c. Identity element

The accidental element is an element that will exist or bind the parties if the parties agree to it.

b. The Principle in Contract

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<sup>26</sup> Ahmadi Miru, *Hukum Kontrak & Perancangan Kontrak* (Jakarta: Rajawali Pers, 2011). P. 31.

1) Consensualism principle

The principle of consensualism contained in Article 1320 of the Civil Code states that, for the validity of an agreement four conditions are required:

- a) Agreement from those who bind themselves (*de toestemming*);
- b) The ability to make an agreement (*de bekwaamheid*);
- c) A certain thing (*een bepaald onderwerp*); and
- d) A legal cause (*een geoorloofde oorzaak*)

The article stipulates that there must be an agreement between the parties that are binding or there is a "consensus". As it is known that there is no specific formality that states an agreement must be written or not, even an agreement can be reached verbally, only verbally. The consensual principle adheres to the basic understanding that an agreement has been born since the agreement was reached. At the moment the agreement is reached, an agreement is born.<sup>27</sup>

2) *Pacta Sunt Servanda* Principle

The principle of *pacta sunt servanda* relates to the consequences of the agreement for the parties that made it. The principle of *pacta sunt servanda* is determined in Article 1338 of the Civil Code, it states that: "All treaties made legally apply as a law for those who make them". As an engagement that is desired by

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<sup>27</sup> G. Rai Widjaya, *Merancang Suatu Kontrak* (Jakarta : Kesaint Blanc, 2008). P, 35.

the parties, it means that the parties also agree to fulfill the obligations they have agreed to in an agreement. If one party does not carry out its obligations, the party that feels aggrieved can force its implementation through the applicable legal mechanism. That is, a contract contains promises that bind the parties as binding the law.<sup>28</sup>

The principle of *pacta sunt servanda*, i.e. that agreements must be honored, has provided a standard of conduct for society from time immemorial. The sanctity of contract is a universal concept and can be found in all legal systems, in all periods of history, in all cultures, and in all religions.<sup>29</sup> According to Grotius it lay at the centre of the international legal order,<sup>30</sup> and according to Ulpian ‘what is so suitable to the good of mankind as to observe those things which parties have agreed upon’.<sup>31</sup> As a basic and universal principle, *pacta sunt servanda* has been codified in International Law in Article 26 of the Vienna Convention on the Law of Treaties,<sup>32</sup> and is recognized in Article 1.3 of the

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<sup>28</sup> Amari, H. Mohammad dan Asep Mulyana, *Kontrak Kerja Konstruksi dalam Perspektif Tindak Pidana*, Jakarta: Aneka Ilmu, 2010. P. 95.

<sup>29</sup> W Paul Gormley, ‘*The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*’ (1969) 14 St. Louis U. L.J. 367, 373

<sup>30</sup> De Jure Belli ac Pacis, lib. III ch. 25, sec. 1.

<sup>31</sup> Digest 2, 14, 7, para. 7

<sup>32</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 365; *Pacta sunt servanda* lies at the heart of the Convention. It applies without exception to every treaty”



UNIDROIT Principles of International Commercial Contracts.<sup>33</sup> It is unquestionably, and understandably, a paramount feature of contract law. It is and remains the principle that provides the predictability of results that contracting parties aspire to as the very reason why they execute contracts in the first place.

3) Good Faith Principle

The definition of good faith and propriety developed in line with the development of Roman contract law, which initially only provided space for contracts that had been regulated in the law (*iudicia stricti iuris* which originated in Civil Law). Receiving contracts based on *bonae fides* that require the application of the Good faith and Compliance Principle in making and implementing the agreement.<sup>34</sup>

Furthermore, the Black's Law Dictionary provides an understanding of good faith: "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it compasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone,...In common usage this term is ordinarily used to describe that state of mind

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<sup>33</sup> UNIDROIT, UNIDROIT Principles of International Commercial Contracts, 2004, 2nd ed

<sup>34</sup> Ridwan Khairandi. 2003, *Itikad Baik dalam kebebasan Berkontrak*. Universitas Indonesia. P. 131

denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation.”<sup>35</sup>

Furthermore, the sources of good faith go back to Roman law.<sup>36</sup> The introduction of the concept of good faith greatly expanded the discretion afforded to Roman magistrates/judge, allowing them to reach beyond strict statutory formalism and judge claims *ex fi de bona*, according to the requirement of contractual good faith.<sup>37</sup> ‘Freedom of contract’ and ‘*pacta sunt servanda*’, basic rules of Roman law, require parties to enter into a contract freely. However, once concluding the contract, it should be performed as agreed. There are some circumstances in which the parties are regarded to be rightful not to perform the contract as agreed, owing to good faith principle which is an exception to these rules. The principle of good faith is the antithesis of formalism and positivism.<sup>38</sup> The doctrine of good faith could safeguard the expectations of contracting parties by respecting and promoting the

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<sup>35</sup> Henry Cambel Black, *Black's Law Dictionary*, fifth edition, 1979, ST. Paul Minn West Publishing Co.P. 623

<sup>36</sup> Martin Josef Schermaier, ‘*Bona Fides In Roman Contract Law*’ in *Good Faith In European Contract Law* ed. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2000)

<sup>37</sup> John Klein. ‘Good Faith in International Transactions’ (1993) 15 *Liverpool Law Review*, 115-141, 116

<sup>38</sup> Auer, Marietta, ‘Good Faith; A Semiotic Approach’ (2002) 2 *European Review Of Private Law* 279-301

spirit of their agreement instead of insisting upon the observance of the literal wording of the contract.<sup>39</sup>

4) Freedom of Contract Principle

The principle of freedom of contract is regulated in Article 1338 paragraph (1) of the Civil Code, it states that: "All treaties made legally apply as a law for those who make it".<sup>40</sup> Freedom of contract provides a guarantee of freedom for someone to be free in several matters relating to the agreement, including:<sup>41</sup>

- a. Free to determine whether he will enter into an agreement or not;
- b. Free to determine with whom he will make an agreement;
- c. Free to determine the contents or clauses of the agreement;
- d. Free to determine the form of agreement;
- e. Other freedoms that do not conflict with statutory regulations.

The principle of freedom of contract is a basis that guarantees the freedom of people in entering into contracts. This is inseparable from the nature of Book III of the Civil Code which is only a governing law so that the parties can deviate it (overriding it), except for certain articles which are forced.

5) Personality Principle

The principle of personality is a principle that determines that someone who will make and / or make agreements is only for the

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<sup>39</sup> Sim, Disa, 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods' [www.cisg.law.pace.edu/cisg/biblio/sim1.html](http://www.cisg.law.pace.edu/cisg/biblio/sim1.html)

<sup>40</sup> Salim H.S, Op., Cit, P. 9

<sup>41</sup> Ahmadi Miru, Op., Cit, P. 4

benefit of individuals. This is stated in Article 1315 and Article 1340 of the Civil Code. The principle of personality stated in Article 1315 of the Civil Code, stated that "In general no one can bind themselves in their own name or ask for an agreement to be determined rather than for themselves". An agreement only lays down the rights and obligations between the parties that make it and does not bind another person (third party) . The point of this provision is that a person who entered into an agreement is only for his own interest.

Article 1340 of the Civil Code states that the agreement only applies between the parties making it. This means that agreements made by the parties only apply to those introduced in Article 1317 of the Civil Code, which can also be stated to be entered into in the interest of a third party, if an agreement made for oneself or a gift from another person, contains a condition such as that. This article constructs that a person can enter into an agreement for the benefit of a third party, with a specified condition. Whereas Article 1318 of the Civil Code does not only regulate agreements for oneself, but also for the benefit of his heirs and for those who have been granted rights

#### **4. Tort**

##### **a. Tort in General**

According to Munir Faudy, tort are as a collection of legal

principles that aim to control or regulate dangerous behavior, to provide responsibility for a loss arising from social interaction, and to provide compensation to victims with an appropriate lawsuit.<sup>42</sup> while, According to R. Wirjono Prodjodikoro, tort is defined as an act that violates the law that the act causes a shock in the balance sheet of the community.<sup>43</sup> Furthermore, the term "*onrechtmatige daad*" is broadly interpreted, so that it includes a relationship that is contrary to decency or with what is considered appropriate in the community's social relations.<sup>44</sup>

According to the one of Dutch legal expert, tort is "delict" "*elke eenzijdige evenwichtsverstoring, elke eenzijdige inbreak op de materiele en immateriele levensgoederen van een persoon of een, een eenheid vormende, veelheid van persoon/een groep*"<sup>45</sup> which means (each disturbance of equilibrium, each disturbance of physical and spiritual property of belonging to a person's life or group of people).

Tort are not only contrary to the law, but also do or not do that violates the rights of others against morality, prudence, and appropriateness in society. Tort (*onrechtmatige daad*) are regulated in Article 1365 to Article 1380 of the Civil Code. Lawsuits against the law are based on Article 1365 of the Civil Code which is: "Every act that violates the law, which brings harm to others, obliges the person who

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<sup>42</sup> Munir Faudi, *Perbuatan Melawan Hukum*, (Bandung : PT. Citra Aditya Bakti, 2002), P. 3

<sup>43</sup> R. Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum*, (Bandung :Sumur1994, P. 13

<sup>44</sup> *Ibid*

<sup>45</sup> Ter Haar, *Beginselen en stelsel van het Adatrecht*, P. 216

because of his mistake to issue the loss, compensates for the loss".

A person who is deemed to have committed a tort may be subject to sanctions by compensating the loss suffered by the victim due to his / her mistake, through a court law suit or an outside dispute resolution agency. However, it must be proven and accounted for the truth of the act against the law by proving the elements of the tort, which consists of:

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- a. Acts against the law
- b. An error
- c. There is a loss
- d. There is a causal relationship between acts against the law, mistakes and losses that exist

Tort are considered to occur by looking at the actions of the offender who are thought to indeed violate the law, contrary to the rights of others, contrary to the legal obligations of the offender, contrary to decency and public order, or contrary to morality in society, however an act that is considered as an tort must still be accounted for whether it contains an element of error or not. Article 1365 of the Civil Code does not distinguish between mistakes in the form of intentions (*opzet-dolus*) and mistakes in the form of carelessness (*culpa*), thus the judge must be able to consider mistakes made by someone in relation to tort, so that

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<sup>46</sup> Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum*, Cet. V, Sumur Bandung, Bandung, 1967, P. 16

compensation can be determined as fair as possible.<sup>47</sup>

A person cannot be prosecuted for having committed a tort, if the act is carried out in an emergency/*noodweer*, *overmacht*, realization of personal rights, because of an employment order or an unforgivable misinterpretation. If the element of error in an action can be proven then he is responsible for the loss caused by the act.

## G. RESEARCH METHOD

According to Soerjono Soekanto, legal research is a form of scientific activity, which is based on certain methods, systematic and thoughts, which aim to study a particular phenomenon or some law, by analyzing it. In addition, an in-depth examination of a legal factor is also carried out, then an attempt is made to resolve the problems that arise in the symptoms concerned.<sup>48</sup>

Moreover, this research uses the Normative which is normative in nature through a normative juridical approach.<sup>49</sup> Normative legal research through library research is research that only focuses on legal studies.<sup>50</sup>

### 1. Research object

According to Supranto the object of research is a set of elements that can be in the form of people, organizations or goods to be studied.<sup>51</sup> Then it was emphasized by Anto Dajan which stated that, the object of research, was the

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<sup>47</sup> Subekti, *Pokok-Pokok Hukum Perdata*, Intermasa, Jakarta, 1979, P. 56.

<sup>48</sup> Sorjono Soekanto, 1981, *Pengantar Penelitian Hukum*, UI Press, Jakarta, P. 43

<sup>50</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, cet. 8, (Jakarta: PT Raja Grafindo Persada, 2004). P. 14.

<sup>51</sup> J. Supranto, 2000, *Statistik (Teori dan Aplikasi)*, Edisi Keenam, Jakarta, Erlangga. P 21

subject matter to be investigated to get data more directed.<sup>52</sup> The object of this research is franchise agreement between Komala Restaurant and PT GBS. In this matter, would analyzing how to protect the object of the research.

## 2. Legal Material

The source for this research would be the theories, regulations and other expert opinion. Furthermore, also the regulations which is stipulated in Law Number 30 of 2000, Government Regulation Number 42 of 2007, Indonesia Civil Code, TRIPs Agrrement and etc.

## 3. Method of Collecting Data

Literature method is a method of gathering/ collecting legal material which is done by reading, searching, quoting, recording, inventorying, analyzing, and studying data in the form of library materials related to research, obtained from libraries, documentation centers, print media and electronic media.<sup>53</sup>

## 4. Research Approach

The research approach is the juridical/statutory approach method, which is an approach that is carried out by analyzing all the laws, verdict and regulations relating to legal issues in research.<sup>54</sup>

## 5. Processing Data Analysis

In normative legal research, data processing is carried out in a systematic way toward written legal materials. Systematization means making a

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<sup>52</sup> Anto Dajan, 1986, *Pengantar Metode Statistik II*, Penerbit LP3ES, Jakarta.

<sup>53</sup> M. Syamsudin, *Operasionalisasi Penelitian Hukum*, PT. RajaGrafindo, Jakarta, 2007, P.

<sup>54</sup> Ibid.,P 58



classification of these legal materials to facilitate analysis and construction of the research.<sup>55</sup> Activities undertaken in the normative legal research data analysis by means of the data obtained in the qualitative descriptive analysis where analysis of data can not be calculated. Legal materials obtained are then subjected to discussion, examination and grouping into certain parts to be processed into information data to answer the problems in the research.



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<sup>55</sup> Soerjono Soekanto dan Sri Mamudji, Op.,Cit., P. 251-252

## CHAPTER II

### GENERAL OVERREVIEW OF TRADE SECRETS IN FRANCHISE AGREEMENT AND WORK AGREEMENT

The purpose of library research in a study is to deepen understanding of the problem to be examined. Literature review can be obtained from literature studies and observations of the results of previous research researchers.

Basically, this research explains the theories of trade secret studies, franchise agreements, work agreements and also trade secrets in Islamic law perspective comprehensively.

#### A. Trade Secret

##### 1. The Definition of Trade Secret

Article 1 clause (1) Law Number 30 of 2000 defines trade secrets as information that is not known by the public in the field of technology and / or business, has economic value because it is useful in business activities, and has been kept confidential by the owner of trade secrets. At the same time, Restatement of the Law of Torts 1939 USA which means a set and harmonization of the trade secret provisions of the states of the USA, sets out the definition of 'trade secrets' in comment (b) of Section 757 provisions that trade secrets are a formula of chemical compounds, patterns, tools or compilation of information, manufacturing processes, trial and preservation materials, machine patterns or other tools, or lists of customers, used in one's business and giving him the opportunity to gain an advantage over rivals who

do not know or do not use it. The type of information which is a trade secret is only information in the business and technology fields.<sup>56</sup>

Furthermore in TRIPs Agreement Section 7 : Protection of Undisclosed Information TRIPs specifically in article 39 clause (2) explains undisclosed information or trade secret is information that has the following characteristics:

- a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- b) it has commercial value because it is secret; and
- c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Moreover, The Uniform Trade Secret Act of 1976 of United States of America (UTSA) defines a trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process,” that:

- a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**<sup>57</sup> While the UTSA was amended in 1985, the amendments did not change any of the act's definitions.

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<sup>56</sup> Henry Campbell Black, M.A, *Black's law Dictionary With Pronunciations*, 6<sup>th</sup> edition, ( St.Paul Minn : West Publishing co, 1990 ), P. 1494.

<sup>57</sup> Jaeger, Trade Secret Law, UTSA 1976 § 1, reprinted as Appendix A1,

In otherside, the definition of trade secret based on expert can be understood by Nuno Carvalho explanation, he is a director of the Intellectual Property and Competition Policy Division at World Intellectual Property Organization who explain the trade secret are a matter of fact before they become a matter of law. Furthermore, trade secrets are at the origin of almost all IPR. In case, before being patents and copyright, IPR are almost all trade secrets.<sup>58</sup>

Meanwhile, Gunawan Wijaya expert from Indonesia explain the understanding of trade secrets can be seen from the following elements: (a). There is an understanding of information; (b). The information is information that is not known by the public; (c). The information is in the technology and / or business field. (d). The information must have economic value; and (e). This information must be kept confidential by the owner.<sup>59</sup>

Moreover, According to Ahmad Ramli, the understanding of trade secrets is all information that is not generally known in the context of trading activities, information that is very strategic in nature has the potential and actually contains high economic value because it can be used to compete with competitors.<sup>60</sup>

After all explanation, it can be concluded that the trade secret means strategic and potential information that is not known by the public and

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<sup>58</sup> Alessandro Marongiu, "Trade Secrets Important But Neglected, IP Experts Say At WTO", <https://www.ip-watch.org/2013/10/07/trade-secrets-important-but-neglected-ip-experts-say-at-wto/> accessed 12 December 2019. 21:38.

<sup>59</sup> Gunawan Widjaja, *Seri Hukum Bisnis Dagang*. Rajawali Pers 2001, P. 78.

<sup>60</sup> Budi Agus Riswandi, Bahan kuliah HKI : *Rahasia Dagang di Internet*, Magister Hukum Universitas Islam Indonesia.

manage privately by the owner in the field of technology and / or business, has economic value, and has been kept confidential by the owner.

## **2. The time of protection of the trade secret**

Indonesia's positive law provides protection for IPR in the form of patents for twenty years and trademark rights for ten years. The right to trade secret information does not have a legal protection period. This means that as long as the owner of the trade secret information still considers the information as confidential, he is entitled to legal protection unless the franchise contract is stated otherwise and agreed by both parties.<sup>61</sup>

## **3. Classification whether an information is a trade secret or not**

Not all confidential information can be categorized as a trade secret. There are several factors used to determine whether the secret can qualify as a trade secret. One such factor is the extent to which precautions are taken by confidential owners to maintain the confidentiality of the information. The act regulates in such a way all the conveniences and difficulties for information that can be known by others. Based on this consideration, the general rule in this information can be protected as a trade secret. If the information is known to the public, then the information is no longer referred as trade secrets. However, if there are security measures to keep the information confidential so that it remains unknown to the

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<sup>61</sup> Syarifah Mahila, "Perlindungan Rahasia Dagang Dalam Hubungannya dengan Perjanjian Kerja", (Jambi: Jurnal Ilmiah Universitas Batanghari Vol.10 No.3:2017), P. 18.

public, then the information is still considered trade secret.<sup>62</sup>

The level of difficulty in obtaining trade secret information is also a determining factor, There is a measure of the level of difficulty for other parties to obtain and possess such information. The measure of difficulty is based on that information the other party duplicate the results of that information. The information should be very difficult to be tapped or duplicated because of the seriousness of the owner in maintaining the confidentiality of the information.<sup>63</sup>

Afterwards, the value of trade secret information for competitors. There are limits that become benchmarks if there is a violation of trade secret information, it will give more benefits to competitors or can cause the owner of the information will lose the proper profit. The point, the confidentiality of this information, if it is known that competitors in the same field and type of business are profitable, can be categorized as trade secrets.

More clearly, article 3 (1) Law Number 30 of 2000 explains the trade secret characteristic are:

1. The information includes technology or business commercial
2. Information that is not publicly known
3. It has economic value that is useful in business activities
4. Confidentiality is maintained by the owner.

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<sup>62</sup> Andry Setiawan, Dewi Sulistianingsih, Rindia Fanny Kusumaningtyas, "Eksistensi Pendaftaran Rahasia Dagang Dan Implementasi Perlindungannya (Studi Di Kanwil Kemenkumham Jawa Tengah)". *Jurnal Law and Justice*, Vol. 3 No. 2 Oktober (2018).

<sup>63</sup> Elis QomatulLailiyah, *Kajian Hak Atas Kekayaan Intelektual: Kekuatan Mengikat Klausula Rahasia Dagang Setelah Berakhirnya Perjanjian Kerja*, 2018, Surabaya, Fakultas Hukum Universitas 17 Agustus 1945, P. 7.

If, the owner of the trade secret has fulfilled the regulation provisions above, the information has been classified as trade secret and protected by law.

#### 4. History of Trade Secret

Arthur Schiller argues that there is evidence that Ancient Roman law safeguarded intellectual property via “*Actio servi corrupti*” which translates to “action for making a slave worse”. *Actio servi corrupti* involved preventing slaves being corrupted by enemies of their owner.<sup>64</sup> It protected trade secrets as well and was used by lawyers at the time as a private law action.<sup>65</sup> That was the history of the trade secret protection.

However, the better-known history or the origin of trade secrets is from English common law in the 1800s. Common law was the foremost source for the system of law and over the years, other laws have helped shape it into what common law countries have today.<sup>66</sup> The foremost noteworthy cases in common law history are in *Newbery v James*<sup>67</sup> (England 1817) and *Vickery v Welch*<sup>68</sup> (United States 1837). Although trade secrets stem from British common law, Massachusetts state supreme court in the United States seems to be the first to

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<sup>64</sup> Lindberg, V. (2008). *Intellectual Property and Open Source*. Sebastopol: O’ Reilly Media Inc. p 110

<sup>65</sup> Watson, A. (1996). “Trade Secrets and Roman Law: The Myth Exploded. *Tul. Eur. & Civ.*” L.F, Vol. 11, 19-29.

<sup>66</sup> Pappas, E., & Steiger, J. (1991). *Michigan Business Torts*. Ann-Arbor: Institute of Continuing Legal Education, p 84.

<sup>67</sup> *Newbery v James* [1817] 2 Mer. 446, 35 Eng. Rep. 1011, 1012-13. see also Carlos M. Nalda, Q.cit. h. 417, *Newberry v. James* is a case related to the obligation, not to disclose or use trade secrets contained in the contract, and the British court recognizes that an agreement to maintain the confidentiality of a drug formula that is not patented is binding on the parties and is valid

<sup>68</sup> *Vickery v Welch* [1837] 19 Pick 36 Mass., 523, 527.

give a detailed description of trade secrets in *Peabody v Norfolk*.<sup>69</sup> In *Peabody v. Norfolk*, the court explored trade secrets in more detail than in prior cases. It finally brought to light the fact trade secrets should not just be covered by breach of contract but should go beyond it through legislation process to uphold the justice and the certainty of the law.

Furthermore, in 1948, the concept of the 'trade secrets' law began to develop in England. Lord Greene in the case of *Saltman Engineering v. Campbell Co.* (1948) 65 RPC 203<sup>70</sup> has given a description of the secret is the fact that the document maker has used his mind, so it gives results that can only be made by someone who takes a long process.<sup>71</sup> Based on this case, it can be concluded that confidential information must not be something which was not public property and public knowledge.<sup>72</sup>

In addition, this opinion was further extended that the information must have economic value as in the case of *Terapin v. Builder's Supply Co. (Hays) Ltd*, that as long as there is secrecy remaining and has economic or commercial value, the information kept confidential is still protected as a trade secret.<sup>73</sup> This case also explains the springboard doctrine<sup>74</sup>, that a person who studies information while being bound to the obligation to keep a secret must not use it as something to his advantage/benefit.

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<sup>69</sup> *Peabody v Norfolk*, 19 Mass, 452,458 (Sup. Court Mass., 1868)

<sup>70</sup> Cita Citrawinda Priapantja, *Budaya Hukum Indonesia Menghadapi Globalisasi Perlindungan Rahasia Dagang Di Bidang Farmasi*. Chandra Pratama, Jakarta, 1999, P. 60.

<sup>71</sup> *Ibid*

<sup>72</sup> Jennifer Davis, *Intellectual property Law*, Oxford University Press, New York, 2005, P. 321

<sup>73</sup> Philip Griffith, "*Intellectual Treaties and Organization in Industrial Property*", material of Training of trainers of Intellectual Property Rights (TOT of IPR), University of Technology Sydney (UTS), Sydney, September-Desember 1997, P. 6-7

<sup>74</sup> *Ibid*.



## 5. Development of Trade Secret Protection in Indonesia

In considering the Act No. 30 of 2000 states that in order to advance an industry that is able to compete in the scope of national and international trade, it is necessary to create an atmosphere that encourages people's creations and innovations by providing legal protection to Trade Secrets as part of the IPR system.

The need to protect trade secrets is a consequence of the ratification of the WTO Agreement through Law No. 7 of 1994. TRIPs Article 39 governing Undisclosed Information came into force in Indonesia on January 1, 2000. So that year the government of the Republic of Indonesia implemented the National Trade Secret instrument, namely Law Number 30 of 2000.<sup>75</sup>

Meanwhile, the legal protection of trade secrets in contracts is regulated in the principle of freedom of contract under Article 1338 BW, Article 1234 BW jo. Article 1242 BW concerning the agreement to do something or not to do something, Article 1603b and 1603d BW on labor obligations.<sup>76</sup> Then, protection based on criminal acts regulated in the Criminal Code Article 322 paragraph (1) concerning the crime of disclosing secrets, Article 323 paragraph (1) concerning matters of notifying specific things about a trading company, Article 382 of the Criminal Code concerning unfair acts and legal principles regarding unfair competition and legal basis based on acts against the law/tort (Article 1365 BW).

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<sup>75</sup> Irawaty, Skripsi, *“Perkembangan dan Perspektif Yuridis Rahasia Dagang Sebagai Benda Jaminan Kredit”*. (Magister Hukum Universitas Indonesia, Depok, Juli 2008). P. 47.

<sup>76</sup> R. Soebekti, *Aneka Perjanjian*, PT Citra Aditya Bakti, Bandung, 1995. P. 61.

## **6. The Theory of The Protection of Trade Secret**

### a. Property rights Theory

The theory of property rights is one of the theories regarding the protection of trade secrets because trade secrets are an asset. As property rights, trade secrets are exclusive and able to be defended against anyone who attempts to misuse or exploit without rights. The owner has the right to make the most of it as long as it does not violate applicable laws. The principle of property rights also known in BW in Article 570 states that: "Property rights are the rights to enjoy the usefulness of a material freely and to do free of that material with full sovereignty, as long as it does not conflict with the laws or general regulations established by a power that has the right to determine it, and does not interfere with the rights of others ; all of which do not reduce the possibility of revoking these rights in the public interest based on the provisions of the law and with the payment of compensation ".

Understanding Article 570 civil code shows that the property rights in the contract are the most important thing where the owner can control the object as freely as possible in the sense of being able to treat legal actions exclusively on the object as well as being able to carry out material acts on the object. In Article 570 the BW also shows that there are restrictions on the property rights, which means that the right of property must not conflict with law and public order,

does not cause interference and the possibility of revocation of rights.<sup>77</sup>

b. Interest Theory

This theory implies that the protection of trade secrets as part of respect for the rights of society for all his efforts in the form of creativity in bringing up new things that can be used to increase efforts to achieve the welfare of humanity and the wider public interest and avoid the possibility other party theft.

c. Engagement Theory

Trade Secrets are objects of an agreement in which the agreement itself raises rights and obligations between parties, whether born by agreement or due to the Law. The basic rights and obligations of an agreement are broader than the basic theory of protecting trade secrets in the form of contracts and acts against the law solely. This is because a person through the basic binding theory can be sued to have the obligation to be responsible according to the basis of the engagement in the form of meeting the needs of the legislation, both those that occur due to human actions or solely due to the Law. The principle of the engagement can be used as a basis for the obligation to protect trade secrets, even if the party and the

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<sup>77</sup> Op. Cit. Ahmad Ramli

owner of the Trade Secret are not involved in an agreement or unlawful act.<sup>78</sup>

d. Contractual Theory

The contractual principles are the basis for the protection of trade secrets of Dutch law which classifies the protection before the contract, when the contract is running and the contract has expired. The principle of protection based on contract law is very relevant to the form of protection based on the labor law system and the franchise legal system. The relationship between employers and employees is one of the important issues regarding trade secrets, especially in franchising. The high level of employee turnover from one company to another causes the need for regulation of Trade Secrets to be integrated into labor laws. This theory is also related to the problem of "insiders" of the company (insider trading). Need to be emphasized that an agreement made by a company with its employees whose contents prohibits the use of technology or information that is publicly known or is in the public domain is an act that is considered as a legal flaw.

e. Misappropriation Theory

This theory states that trade secrets must not be obtained through improper means both contrary to the law or the norms that exist in

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<sup>78</sup> Op.,cit P. 74-76

societyt.<sup>79</sup> Furthermore, based on Pedro A. Padilla Torres states a theory that is Protection of property, confidentiality or from unfair competition, that this theory focuses on the relationship between the parties and the context of the information transmitted which should not be contradicted in inappropriate ways with unfair competition.<sup>80</sup>

Furthermore, when the Paris Convention for the Protection of Industrial Property was implemented in 1883, part of the reason was to prevent unfair competition. In the end, the convention forbids unfair competition between its members, although in fact this convention does not clearly state violations of trade secrets. But the rationale for protecting trade secrets in this convention is based on the unfair competition approach and misappropriation theory. Also that Article 1 (2) can be interpreted broadly. As written by Pedro A. Padilla Torres<sup>81</sup> The examples of unfair competition provided by the Paris Convention do not include trade secrets violation. Thus, it has never been clear if industrial espionage or other unfair means to appropriate a trade secret accounts for unfair competition. Nevertheless, it could be argued that misappropriation of trade secrets is unfair competition under the Paris Convention terms. That is true if the unfair competition approach and misappropriation

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<sup>79</sup> AusAID, *Hak-hak Kekayaan Intelektual*, Indonesia Australia Specialised Training Project—Phase II, 2001, P. 3.

<sup>80</sup> A. Padilla Tores, “*An overview of International Trade Secret Protection from the International Trade and Investment Perspective*,” <<http://www.natlaw.com/pubs/spmxi14.htm>>, accessed: 11 Desember 2019, 21:01.

<sup>81</sup> Ibid. P.4.

theory are the justification for trade secret protection. Also, the Paris Convention Article 1 (2) establishes that industrial property shall be understood in its broadest sense.

But the legal consequences of the Paris Convention are unclear because of the lack of implementing regulations. Finally in 1986, at the beginning of the Uruguay Round the GATT stated that it was important to protect IPR<sup>82</sup> Therefore, international trade regulations regarding IPR are stipulated in the TRIPs Agreement with the basic principle that WTO members must apply the same arrangements in their respective countries.

In practice, in many countries the law regulates trade secrets, protecting various types of trade secrets against misuse other than by the creators. Common examples of concepts or information that get legal protection are as follows: customer lists, market research, technical research, food recipes or ingredients used to produce certain products, certain work systems that are quite profitable, ideas or concepts that underlie advertising or marketing campaigns , financial information or price list that shows the profit margin of a product, a way to change or produce a product using chemicals or machinery.<sup>83</sup>

Some of the explanations above are obtained in unfair ways as an employee exits from one company to another and discloses the

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<sup>82</sup> Ibid.

<sup>83</sup> Tim Lindsey, et al., eds., *Hak Kekayaan Intelektual Suatu Pengantar*. Bandung: Alumni, 2013.P. 236.

trade secrets to his competitors to the detriment of the trade secret owner or in the case of a franchise business, when the contract ends the franchisee runs the same business. with a different trademark but still use the same business method in which the business method is a trade secret of the franchisor protected by law.

## 7. Restrictions on Trade Secret Protection

Protection of trade secrets is very important, but there are still exceptions to the provisions. In the provisions of article 15 of Law Number 30 Year 2000 which states:

"The acts referred to in Article 13 are not considered violations of trade secrets if:

- (1) acts of disclosure of trade secrets for the use of public defense, health or safety.
- (2) re-engineering of products resulting from the use of trade secrets belonging to others carried out solely for the benefit of the further development of the product concerned."

That's means, disclosure of trade secrets can be done, if it involves the public interest, if the defense of security, health, public safety requires the relevant information. There is no trade secret if it is against the law, the interests of the community, or it arises from criminal acts, fraud or unfair acts, and re-engineering is justified.<sup>84</sup>

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<sup>84</sup> Rahmi Jened Parinduri Nasution, *Interface Kekayaan Intelektual dan Hukum Persaingan (Penyalahgunaan HKI)*, Depok: PT. Rajagrafindo persada, 2013. P.281

## **B. Franchise Agreement**

### **1. The definition of Franchise Agreement**

According to Government Regulation Number 42 Year 2007 explicitly defines that a franchise agreement is a business system with business characteristics with the aim of marketing goods and/or services that have been proven successful and can be utilized and/or used by other parties based on the agreement of the parties. Whereas according to Article 1 paragraph 1 of the Decree of the Minister of Industry and Trade No. 259/MPP/Kep/7/1997 concerning Provisions and Procedures for the Implementation of Franchise Business Registration, what is meant by franchising is an engagement or legal relationship in which one party is given the right to utilize and or use intellectual property rights or inventions or business characteristics owned by other parties with a reward based on the conditions set by the other party, in the context of supplying and / or selling goods and or services.

Meanwhile, According to Peter Mahmud, a legal definition of franchise agreement: A contract that gives rights to other parties to use the names and procedures owned by those who have the rights.<sup>85</sup> further, according to Johanes Ibrahim's opinion, a franchise agreement is a marketing system of goods and / or services and / or technology, which is based on a closed and

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<sup>85</sup> Salim HS. Op., Cit.P. 65



continuous collaboration between independent actors (meaning Franchisor and individual franchisee) and separated both legally and financially, where Franchisor gives franchisee rights and imposes obligations to conduct business according to the Franchisor concept.<sup>86</sup>

Moreover, According to V. Winarto, a franchise agreement is a partnership relationship between entrepreneurs who have strong and successful businesses and entrepreneurs who are relatively new or weak in the business with the aim of mutual benefit, especially in the business of providing products and services directly to consumers.<sup>87</sup>

Last one, according to Bryce Webster stated the definition of franchise agreement from a juridical aspect. A licensing agreement given by the Franchisor with certain payments. The license granted can be in the form of a patent license, trade mark, service mark, etc. used for the above mentioned trading purposes.<sup>88</sup>

After all explanation, the conclusion of franchise agreement is a business system with IPR licensing agreement between the parties with the aim of mutual benefit and have been fulfil the franchise business requirement based on applicable law.

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<sup>86</sup> Johanes Ibrahim dan Lindawaty S. *Hukum Bisnis – Dalam Persepsi Manusia Modern*, PT Refika Aditama, Bandung 20017. P.114.

<sup>87</sup> V. Winarto, “*Pengembangan Waralaba (Franchising) Di Indonesia Aspek Hukum dan Nonhukum*” dalam Juajir Sumardi, *Aspek-Aspek Hukum Franchise dan Perusahaan Transnasional*, (Bandung : Citra Aditya Bakti, 1995), P. 9

<sup>88</sup> Ridwan Khaerandy. *Aspek-Aspek Hukum Franchise dan Keberadaannya Dalam Hukum Indonesia*. (Yogyakarta: Majalah Unisa UII, 1992). P. 87

## 2.Types of Franchise Agreement

According to IFA there are 4 (four) basic type of Franchise which used to United States:<sup>89</sup>

### a. Product Franchise

Manufacturers use the product franchise to govern how a retailer distributes their product. The manufacturer grants a store owner by the manufacturer and allows the owner to use the name and trademark owned by the manufacturer. The store owner must pay a fee or purchase a minimum inventory of stock in return for these rights. Some tire stores are good examples of this type of franchise.<sup>90</sup>

### b. Manufacturing Franchise

These types of franchises provide an organization with the right to manufacture a product and sell it to the public, using the Franchisor's name and trademark. This type of franchise is found most often in the food and beverage industry. Most bottlers of soft drinks receive a franchise from a company and must use its ingredients to produce, bottle, and distribute the soft drinks.<sup>91</sup>

### c. Business Opportunity Ventures

These ventures typically require that a business owner purchase and distribute the products for one specific company. The company must provide customers or accounts to the business owner, and, in return, the

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<sup>89</sup> Laver ne Ludden, *The Franchise 'Opportunities Handbook*, Copyright 1996, JIST Works, Inc., Indianapolis, IN.

<sup>90</sup> Johanes Ibrahim dan Lindawaty S. Loc., Cit. P. 114

<sup>91</sup> Ibid. P. 126

business owner pays a fee or other consideration as compensation. Examples include vending machine routes and distributorships.<sup>92</sup>

#### **d. Business Format Franchising**

This is the most popular form of franchising. In this approach, a company provides a business owner with a proven method for operating a business using the name and trademark of the company. The company will usually provide a significant amount of assistance to the business owner in starting and managing the company. The business owner in starting and managing the company. The business owner pays a fee or royalty in return. Typically, a company also requires the owner to purchase supplies from the company.<sup>93</sup>

### **3. Franchise History**

The history of franchising was first born in the United States approximately a century ago when the sewing machine company 'Singer' began to introduce the concept of franchising as a way to develop the distribution of its products. Likewise beer companies give licenses to small companies in an effort to distribute beer produced by the factory concerned, as well as the distribution or sale of cars and gasoline. Franchise at the time was carried out at the distributor level.<sup>94</sup>

Franchise is fast becoming the dominant model in distributing goods and services in the United States. According to The International

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<sup>92</sup> Ibid

<sup>93</sup> Ibid

<sup>94</sup> Salim H.S, *Op. Cit.*

Franchise Association, currently one of twelve trading businesses in the United States is a franchise. Franchises absorb eight million workers and make up 41% (forty-one percent) of all retail businesses in the United States.<sup>95</sup>

In Indonesia Pertamina and Jamu Meneer Herbal Company is one of the pioneers of the franchise business in Indonesia which licenses the sale of herbal medicine to traditional medicine entrepreneurs. Even, foreign franchises entered and developed rapidly in Indonesia by giving licenses to local entrepreneurs, such as Coca Cola, KFC, McD, Starbucks, Dunkin Donat companies, and others. This causes business competition for local small entrepreneurs engaged in similar business fields, because the franchise business is so unique and profitable.<sup>96</sup>

#### **4. The Differences Between Franchise Agreement and License Agreement**

License agreements and franchise agreements are similar but not the same type of agreement. Ordinary people will assume that this type of agreement is the same, and often make licensing agreements with the concept of franchising and vice versa. Whereas in the juridical concept, the two types of agreements clearly have differences, and moreover the difference between

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<sup>95</sup> Suharnoko, *Hukum Perjanjian: Teori dan Analisis Kasus*, Jakarta: Kencana Prenada Media Group, 2009, P. 82.

<sup>96</sup> Abdulkadir Muhammad, *Hukum Perusahaan Indonesia*, Bandung: PT. Citra Aditya Bakti, 2010, P 554-555.

the two brings different legal consequences, so that both of these agreements cannot be mixed with their use.<sup>97</sup>

The main difference in a franchise agreement and licensing agreement is that, in a franchise agreement, it involves an obligation to use a system and business method or format determined by the franchisor. In a franchise the involvement of a franchisor is more limited, not limited to giving permission to use the rights to the IPR but also the business must survive. Franchisors must monitor, guide, provide training, carry out marketing programs and other ongoing assistance. Whereas the license agreement is only limited to granting permission to use or use IPR (trade secret rights) but not with its business format.<sup>98</sup>

Furthermore, in the licensing agreement, there is a royalty fee while in the franchise agreement besides the royalty fee there will be initial training costs, product costs and so on. then, Registration of license agreement is registered with the Director General of IPR and if there is a dispute in the contract then it is in the absolute competence of the Commercial Court while the franchise agreement is registered with the Department of Trade and Industry, if there is a dispute in the franchise agreement then it is in the absolute competence of the District Court.<sup>99</sup>

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<sup>97</sup> Andyna Susiawaty Achmad, "Prinsip Perjanjian Campuran Dalam Perjanjian Lisensi Dan Perjanjian Waralaba", Journal GEMA AKTUALITA, Vol. 1 No. 1, Desember 2012, P. 1.

<sup>98</sup> Ibid. P.4.

<sup>99</sup> Ibid

## 5. The Particular of Franchise Agreement

The franchise agreement contains at least :<sup>100</sup>

a. Having a certain business characteristic

What is meant by business characteristics is a business that has advantages or differences that are not easily imitated compared to other similar businesses, and makes consumers always look for these characteristics. For example, management systems, sales and service methods, or structuring or distribution methods that are special characteristics of the Franchisor.

b. Proven has profits

What is meant by proven benefits has been to refer to the experience of the Franchisor who has owned more or less 5 years and has business tips to overcome problems in the course of his business, and this is proven by still surviving and developing the business profitably.

c. Have a standard for services and goods and / or services

What is meant by standards of services and goods and / or services offered that are made in writing are written standards so that the Franchise Recipient can conduct business within a clear and equal framework (standard operational procedures).

d. Easily teaching and apply

What is intended to be easily taught and applied is easy to implement so that the Franchise Recipient who does not yet have the experience or

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<sup>100</sup> Article 3 Government Regulation Number 42 of 2007 on Franchise

knowledge of a similar business can carry it out properly in accordance with ongoing operational and management guidance provided by the Franchisor.

e. There is ongoing support

What is meant by ongoing support is support from the Franchisor to the Franchisee on an ongoing basis such as operational guidance, training and promotion.

f. IPR have been registered

What is meant by registered IPR is intellectual property rights related to businesses such as trademarks, copyrights, patents and trade secrets, have been registered and have certificates or are in the process of registering at authorized institutions.

Furthermore, in the expert's opinion, V. Winarto identified the main characteristics contained in the franchise system, as follows:

- a. There is written agreement.
- b. During the contract, the franchisor allows the franchisee to use the franchisor's trademark and business identity in the area of business agreed upon by the party.
- c. During the contract, the franchisor provides services to prepare the business and conduct ongoing assistance to the franchisee.
- d. During the contract, the franchisee follows the conditions that have been prepared by the franchisor, to be the basis of a successful business.

- e. During the contract, the franchisor controls the results and position as the leader of the cooperation system.
- f. Ownership of the business entity that is run is entirely in the franchisee.<sup>101</sup>

Meanwhile, according to Martin D. Fern, see the franchise or franchise from the requirements to fulfill 4 (four) elements, as follows:

- a. Granting the right to do business in certain businesses;
- b. License to use business identification; usually a trademark or service mark, which will be an identifying feature of the franchise business;
- c. License to use a marketing plan and extensive assistance by the franchisor to the franchisee; and
- d. Payment by the franchisee to the franchisor in the form of something of value for the franchisor apart from the bona fide wholesale price of goods sold.<sup>102</sup>

Furthermore, Martin Mendelson mentions there are 10 (ten) things that must be considered in making a franchise contract made in detail, which consists of:<sup>103</sup>

- a. Planning and identifying the interests of the franchisor as the owner, this will certainly involve matters such as trademarks, copyrights and business systems of the franchisor along with the trade secret.

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<sup>101</sup> Meila Indira, "Analisa Perjanjian *Franchise* Antara PT. Indomarco Prismatama Indomaret Sebagai Franchisor dengan CV. Berkah Abadi Sebagai *Franchisee*," (Skripsi Sarjana Hukum Universitas Indonesia, Depok, 2004). P 27-28.

<sup>102</sup> Ibid. P. 25-26

<sup>103</sup> Martin Mendelson, *Franchising, Petunjuk Praktis Bagi Franchisor dan Franchisee*, (Jakarta: Pustaka Binaman Pressindo, 1997), P. 58-63.



b. The nature and extent of the rights granted to the franchisee, this concerns the area of operation and the formal granting of rights to use trademarks, trade names and so on.

c. Duration of the agreement. The basic principle in regulating this is that the franchise relationship must last for a long period of time, or at least for 5 (five) years with the clause of the franchise contract being extended.

d. The nature and extent of the services provided, both in the initial and subsequent periods. This will involve introductory services that allow franchisees to start, train and be equipped with equipment to do business. In the future, the franchisor will provide services in detail should be regulated in the contract and also allowed to introduce new ideas.

e. Initial and subsequent obligations of the franchisee.

will regulate the obligation to accept the financial burden of establishing a business in accordance with the requirements of the franchisor and carry out compliance with other operating, accounting and administrative systems to ensure that important information is available to both parties. These systems will be stated in the operational instructions that will be delivered to the franchisee during the training and will continue to be available as a guideline / reference after he opens his business.

f. Operational control over franchisees.

These controls are to ensure that operational standards are properly

controlled, because failure to maintain standards on one franchise receiver will disrupt the entire franchise network.

**g. Sales of business.**

One of the keys to success of a franchise is the motivation that is instilled in the franchisee, along with the entrepreneurial nature of the franchisee, and the incentives generated from capital gains. For this reason, franchised businesses must be able to be sold. Franchisor should be very selective when considering applications from franchisees, especially those who will join the network by buying business from established franchises.

**h. End of the franchisee**

To provide peace for the franchisee, provisions must be made that the franchisor will provide assistance to enable the business to be maintained as an asset that needs to be realized or if it cannot be taken over by the heirs if the heirs qualify as a franchisee.

**i. Arbitration.**

The contract should determine the resolution of disputes that may arise through arbitration, with the hope that the resolution will be faster, cheaper and not open to the dispute to the public.

**j. The termination of the contract and its consequences.**

In a contract there must always be provisions governing the termination of the agreement. Need to be added to the contract, the franchisee has an obligation for a certain period of time not to compete with the franchisor

or other franchisees, nor is it permitted to use the franchisor's system or method.

Franchising is basically a package consisting of several types of agreements. The agreement in question usually consists of a licensing agreement, a trademark agreement, a patent agreement, a technical assistance agreement and regarding agreements relating to confidentiality. After the terms of the franchise agreement have been fulfilled by the parties, both the franchisor and the recipient of the franchise and have agreed, the agreement is binding for the parties and serves as a law for them.

## **8. Legal Relationship Between Franchisor and Franchisee in Franchise Agreement**

The legal relationship between Franchisor and Franchisee is characterized by an unequal bargaining power in negotiations to determine clauses and performance in contracts. Franchise Agreement is a standard agreement made by Franchisor. The Franchisor sets the terms and standards that must be followed by the Franchisee that allows the Franchisor to cancel the franchise contract if he considers the Franchisee unable to fulfill its obligations.<sup>104</sup>

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<sup>104</sup> Suharnoko, *Sejarah dan Pengertian Franchise*. Jakarta Timur. Prenada Media 2004. P.15.

The Franchisor also has the power to assess all aspects of Franchisee's business, so that the agreement does not provide adequate protection for the Franchisee in the face of termination of the agreement and the Franchisor's refusal to renew the agreement.<sup>105</sup>

The form of the Franchise agreement between the Franchisor and the Franchisee is one of the patterns of legal relations or so-called partnership patterns between small businesses and medium businesses and large businesses to carry out business methods whose operations have been designed and established by the Franchisor.

The main characteristics of the legal relationship between Franchisor and Franchisees in the Franchise agreement as follows:

1. There is written agreement.
2. Use of the trademark and business identity of the Franchisor in an agreed Franchise business field. This will lead to associations in the community with the similarity of products and services with the Franchisor.
3. During the contract the Franchisor provides business preparation services and conducts ongoing assistance to the Franchisee.
4. During the contract the Franchisee follows the conditions that have been prepared by the Franchisor to be the basis of a successful business.
5. During the contract the Franchisor carries out control of results and activities as well as its position as leader of the cooperation.<sup>106</sup>

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<sup>105</sup> Ibid.

<sup>106</sup> Indira Hastuti. "Aspek Hukum Perjanjian Waralaba (Franchise)". Semarang, 2006. Jurnal Hukum. Fakultas Hukum UNTAG Semarang.P.32

## 9. Post Termination Issue in Franchise Agreement

Termination of a franchising arrangement can be carried out under a mutual agreement or at the choice of one of the parties. If under the latter scenario, this could raise either a post-termination dispute, or both. Franchising arrangements are usually governed by franchise agreements. Most of the time, the reason for termination could be due to breach of the contract provisions, violation of trade secret, failure to make royalty payments, non-adherence to the quality standards, failure to meet reasonable sales goals, damage to franchisor's trademark or reputation, sale of competitor products, encroachment over franchisee's exclusive territory or discrimination by franchisor, non-renewal of franchise agreements, or breach of the implied covenant of good faith and fair dealing.<sup>107</sup>

One of the more common post-termination issues arises with regard to non-compete covenants is protect the franchisor's legitimate business interest in preserving its goodwill and stopping competition. These covenants gain more importance, especially in reference to post-termination period and are incorporated in most franchising agreements. By including non-competition clauses, a franchisor can protect its trademarks, trade secrets, goodwill,

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<sup>107</sup> Christine E. Connelly, Robert Lichtenstein, & M. Elizabeth Moore, "International Franchise Ass'n, Franchise Default An Termination, Best Practice to Enforce The Contract and Protect the System", 3 (2012), available at <http://www.franchise.org/uploadedFiles/IFA-Events/SecondaryPages/Franchisedefault.pdf>.

market share, and protect itself and its other franchisees from unfair competition.<sup>108</sup>

## **10. Legal Protection of franchisor's Trade Secret in Franchise Agreement**

Article 4 of Law Number 20 of 2000 concerning Trade Secrets regulates the authority or rights possessed by owners of trade secrets to their trade secrets to:

1. Using his own trade secrets.
2. Give licenses to or prohibit other parties from using trade secrets or disclose those trade secrets to third parties for commercial purposes.

Under this Article the owner of a trade secret has a monopoly right to use his own trade secret in business activities for economic gain. This provision also means that only the owner of trade secrets has the right to give permission to other parties to use trade secrets that he has through the Franchise or License agreement.<sup>109</sup>

In addition, the owner of trade secrets is also entitled to prohibit other parties from using or disclosing their trade secrets to third parties if the disclosure is done for commercial purposes.<sup>110</sup>

Protection of trade secrets in general can be divided into three:

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<sup>108</sup> See Robert W. Emerson, "Franchising Covenants Against Competition," 80 Iowa L. Rev. 1049, 1052 (1995); Peter J. Klarfeld & Kathleen D. Kennedy, Covenants Against Competition in Franchise Agreements, 4 Franchise L.J. 3, 10 (1984).

<sup>109</sup> Ahmad M. Ramli. *Pengertian dan Ruang Lingkup Rahasia Dagang*. Bandung 2001. Mandar Maju. P.5.

<sup>110</sup> Ibid

### 1. Protection of Trade Secrets Based on Agreement

Protection of trade secrets based on the agreement is regulated in Article 5 paragraph (1) letter d of Law Number 30 of 2000, which states that protection of trade secrets arises based on a written agreement. Specifically for the transfer of rights on the basis of an agreement, it is necessary to have a transfer of rights based on the making of a deed, especially an authentic deed. This is important considering that the aspects covered are so broad, in addition to safeguarding the interests of each party that has an agreement to transfer the rights to the trade secret.<sup>111</sup>

### 2. Violation of Trade Secret

Provisions regarding violation of trade secrets are regulated in Chapter VII Article 13, Article 14 and Article 15 of Law Number 30 of 2000. In Article 13 states that "Violation of trade secrets can also occur if someone intentionally reveals trade secrets, reneges on agreements or breaking the contract written or unwritten to protect the trade secret concerned ". Based on the above provisions, violations of trade secrets are deemed to have occurred if someone intentionally revealed information or reneged on agreements or breach of contract on the agreements that had made to safeguard the intended trade secrets.

### 3. Settlement of Disputes of Trade Secrets

In Law Number 30 of 2000, the dispute resolution mechanism is stated in Article 11 which states that "The holder of a Trade Secret Right or the

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<sup>111</sup> Ibid. P.9.

licensee may sue anyone who intentionally and without the right to carry out the acts referred to in Article 4, in the form of a claim for compensation or cessation of all acts as referred to in Article 4 ". The claim as referred to in paragraph (1), is submitted to the District Court.

## **C. Work Agreement**

### **1. The Definition of Work Agreement**

Work relationship is a relationship between a laborer and an employer. The employment relationship shows the position of both parties which basically describes the rights and obligations of workers towards the employer as well as the rights and obligations of the employer to the worker.<sup>112</sup>

Work agreement according to Law No. 13 of 2003 concerning Manpower is an agreement between workers and employers or employers that contains terms of work, rights and obligations of the parties.<sup>113</sup> Work agreement according to article 1601 a Civil Code is an agreement whereby one party the worker, binds himself to under the command of the other party, the employer for a certain time to work on the employee by paying wages.

Furthermore, the work agreement according to A. Ridwan Halim and friends is an agreement entered into between the employer and the employee or certain employees, which generally relates to all the requirements that must

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<sup>112</sup> Iman Soepono, *Pengantar Hukum Perburuhan*, Djambatan, 1987, P. 55.

<sup>113</sup> Article 1 point 14, Law Number 13 of 2003, on Labour.



be fulfilled by both parties, in accordance with their rights and obligations each with respect to each other.<sup>114</sup>

The work agreement according to Subekti is an agreement between an employee and the employer, the agreement is marked by the characteristics of a certain salary or salary agreed upon and the existence of a limited relationship (*dierstverhanding*) that is a relationship based on which one party (the employer) has the right to give orders must be obeyed by other parties.<sup>115</sup>

## 2. Relationship Between the Parties in the Work Agreement

Article 1314 paragraph (1) of the Civil Code says that an agreement can be made in vain, according to paragraph (2) the party that gives results to another party, while he himself does not receive the results, then according to article 1314 paragraph (3) the Civil Code states that each has an obligation to give something and to do an action.<sup>116</sup>

Work relationships are often manifested in work agreements. An employment agreement is an agreement in which one party (laborer) binds itself to another party (company), for a certain period of time with wage determination.<sup>117</sup>

The working relationship between workers and companies is a reciprocal relationship. That is, there are those who accept and make performance. The

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<sup>114</sup> Djumadi,, *Tentang Ketenagakerjaan*, Jakarta, Grafindo, 2004, P. 33

<sup>115</sup> Ibid, P. 30

<sup>116</sup> Wirjono Prodjodikoro, *Asas-asas Hukum Perjanjian*, Mandar Maju, Bandung, 2000. P.

<sup>117</sup> F.X. Djumialdji, *Perjanjian Kerja*, Bumi Aksara, Jakarta, 2001. P. 18.

company accepts labor or labor services. Vice versa, workers receive wages for the labor expended. Thus, the employment relationship between workers and companies is called work relations.

### **3. The termination of the work agreement**

According to article 61 paragraph 1 of Law No. 13 of 2003 concerning Manpower,

The work agreement ends if:

1. The worker dies
2. The term of the work agreement is over
3. The existence of a court decision and / or determination of a settlement institution industrial relations disputes that have permanent laws.
4. There are certain conditions or events that are listed in the work agreement, company regulations, or collective work agreements that can cause the termination of employment.

### **D. Trade Secret in Islamic Perspective**

Islam is a religion of laws in every dimension. Islamic laws address matters ranging from the timing of daily prayers, fasting, and prohibitions against eating certain foods to marriage, inheritance, and commerce.<sup>118</sup> Islam acquired its characteristic as a religion uniting itself in both the spiritual and temporal aspects

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<sup>118</sup> M Cherif Bassiouni & Gamal M Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making', UCLA Journal of Islamic & Near East Law, 2002. 135, 149.

of life and seeking to regulate, not only the individual's relationship to Allah, but human relationships in a social setting as well.<sup>119</sup> Thus, there is an Islamic law governing virtually all aspects of a Muslim's life.

In line with above statement, In 2005, MUI issued MUI Fatwa Number: 1 / MUNAS VII / MUI / 5/2005 concerning Protection of Intellectual Property Rights. This fatwa issued by MUI is a response to the needs of the community related to the protection of intellectual property. In the Qur'an and al-Hadith it is not explicitly mentioned about IPR, but the MUI then refers to the results of previous ulama ijihad. Some of these opinions include Majma'al-Faqih al-Islami number 43 (5/5) Mu'amar V in 1409 H / 1988 AD about al-Huquq al-Ma'nawiyah which in essence says that trade secrets, copyrights, the rights to trademarks, and the rights to the works or creations whose characteristics are equal to the material rights protected by *syara'* because they are the special rights of their owners which have economic value and a part of one's wealth so that these rights may not be violated.<sup>120</sup>

Furthermore, the majority of scholars from the Maliki, Shafi'i and Hambali schools argue that IPR or copyrighted works of original and useful creations are classified as valuable assets as objects if permitted to be used *syara'* (Islamic law).<sup>121</sup>

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<sup>119</sup> Hossein Esmaeili, 'The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World', Connecticut Journal of International Law, 2011, 329, 34

<sup>120</sup> Budi Agus Riswandi dan Shabi Mahmashani, *Dinamika Hak Kekayaan Intelektual Dalam Masyarakat Kreatif*, (Yogyakarta: Pusat Hak Kekayaan Intelektual Fakultas Hukum Universitas Islam Indonesia dan Total Media, 2009), P.141.

<sup>121</sup> Dr. Fathi al-Duraini, *Haqq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran*, Bairut: Mu'assasah al-Risalah, 1984, P. 20.

Furthermore, the Word of God in the Qur'an relating to trade secrets explicitly and about the prohibition of using other people's property in a vanity (without rights) as well as the prohibition on harming the property and rights of others, among others as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

*“O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.” (QS. An-Nisa' [4]: 29).*

وَلَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ وَتُدْخِلُوا بِهَا إِلَى الْحُكَّامِ لِيَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

further, *“And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].” (QS. al-Baqarah [2]: 188).*

وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تَعْنُوا فِي الْأَرْضِ مُفْسِدِينَ

then, *“And do not deprive people of their due and do not commit abuse on earth, spreading corruption.” (QS. al-Syu'ara [26]: 183).*

Then, the hadiths of Rasulullah S.A.W about wealth are as follows:

1. Whoever leaves the property (wealth), then (the treasure) for his heirs, and whoever leaves the family (poor), leave it to me (Hadith by Bukhari).

2. Rasulullah SAW. deliver sermons to us; His saying: "Know: it is not lawful for anyone in the least of his brother's property except by his willingness." (Hadith by Ahmad).

3. O my servants! Truly I have forbidden tyranny over Me and I have made it a forbidden thing among you; then, do not hurt each other (Hadith by Muslim).<sup>122</sup>

At this point, matters relating to the assets of others including the right to trade secrets are protected in the Islamic perspective. Islamic law basically respects IPR which are the result of human creativity that has an element of novelty and originality. Islam by law defines that, intellectual property must be protected like other objects that are real and can be seen. The protection provided is a form of IPR law. So that Islam is quite accommodating in matters of intellectual property protection.<sup>123</sup>

Muslims believe that all property belongs to Allah (s.w.t).<sup>124</sup> The private owner of property acts as a trustee or agent for Allah (s.w.t), the ultimate owner. Nevertheless, Islam cherishes the inviolability of private property. Under Islamic Law, ownership of real property can be acquired through contractual agreements or by appropriation.<sup>125</sup> Under the appropriation right, one may acquire title to vacant real property by developing it and making it productive. Ownership of personal property can be also acquired through extracting and possessing

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<sup>122</sup> See: Consideration section of Fatwa MUI Nomor: 1/MUNAS VII/MUI/5/2005 Tentang Perlindungan Hak Kekayaan Intelektual (HKI)

<sup>123</sup> Budi Agus Riswandi dan Shabi Mahmashani, *Op. Cit.*, P, 143.

<sup>124</sup> The Qur'an states 'Unto Allah belongeth whatsoever is in the heavens and whatsoever is in the earth'. See Al- Qur'an 3:129

<sup>125</sup> See Steven D Jamar, 'The Protection of Intellectual Property under Islamic Law' (1992) 21 *Capital University Law Review* 1079, 1084; this article provides a detailed explanation of the concept of appropriation by developing vacant property, called Mawat

materials from the earth or public land.<sup>126</sup> This resembles Locke's labour theory and 'sweat of the brow' standard in intellectual property rights.<sup>127</sup> As such, ownership is rewarded to an individual who exerts efforts in developing materials and so they are thus entitled to the fruits of their labour. The Prophet Muhammad (s.a.w) was reported to have said: Nobody has ever eaten a better meal than that which one has earned by working with one's own hands. The Prophet of Allah, Daud A.S used to eat from the earnings of his manual labor.<sup>128</sup> An individual who spends time and energy creating new works – physical or otherwise – should be entitled to the value of their works including protect their trade secret.



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<sup>126</sup> Ibid. 185.

<sup>127</sup> Donna M Byrne, 'Locke, Property, and Progressive Taxes' (1999) 78 Nebraska Law Review 700, 703.

<sup>128</sup> See Sahih Bukhari, The Hadith Book –Sales and Trade, Topic 34, available at <[http://www.searchtruth.com/book\\_display.php?book=34&translator=1&start=0&number=281](http://www.searchtruth.com/book_display.php?book=34&translator=1&start=0&number=281)> accessed 14 December 2019. 01:24 WIB.

**CHAPTER III**

**LEGAL CONSEQUENCES AND LEGAL PROTECTION OF  
FRANCHISOR TRADE SECRET IN FRANCHISE AND WORK  
AGREEMENT**

In this chapter, the author will describe and discuss the results of research, in accordance with the problems that have been determined. These problems are related to: 1) Legal consequences of violation of trade secret by franchisee and ex employee toward franchisor's trade secret, and 2) Legal protection of the franchisor's trade secret in franchise and work agreement. Two points above, is a further explanation of the problem formulation that has been determined in the previous chapter

**A. How are the Legal Consequences of Violation of Trade Secret by Franchisee and Ex Employee.**

**1.The consequences of criminal charges**

Pursuant to article 13 Law Number 30 of 2002 Violation of trade secrets occurs when someone intentionally reveals a trade secret, violates an agreement or breaks a written or unwritten obligation to safeguard the trade secret concerned. Furthermore, article 14 states that a person is considered to violate another party's trade secrets if he obtains or controls the trade secrets

in a way that is contrary to applicable laws and regulations .Meanwhile, the acts referred to are not considered violations of trade secrets if:

- a. the act of disclosing trade secrets or the use of trade secrets is based on the interests of public defense, health or safety;
- b. re-engineering measures for products resulting from the use of trade secrets belonging to others carried out solely for the benefit of the further development of the product concerned.<sup>129</sup>

If someone commits an offense as referred to in articles 13 and 14 above, then according to Law Number 30 of 2002 there are at least two legal consequences namely criminal and civil. In the criminal concept, criminal offenses against violations of the right to trade secrets constitute offenses of complaint, so they are not ordinary offenses. An investigation can only be carried out if there is a complaint from the rightful party, namely the right holder or recipient of trade secret rights.

In Law No. 30 of 2000 the crime against the crime was formulated as follows: *(1) Anyone who intentionally and without the right to use another party's trade secrets or to commit acts referred to in Article 13 or Article 14 shall be sentenced to a maximum imprisonment of 2 years and/or a maximum fine of Rp. 300,000,000.00.*

*(2) Criminal acts referred to in paragraph (1) constitute complaint offense.<sup>130</sup>*

In the other hand, for investigators of these criminal offenses, in addition

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<sup>129</sup> Article 15 Law Number 30 of 2002 On Trade Secret

<sup>130</sup> Article 15 Law Number 30 of 2002 On Trade Secret



to the Investigator of the State Police of the Republic of Indonesia, the Investigator of Civil Servants in a department whose scope of duties and responsibilities includes Intellectual Property Rights may also be given special authority as an investigator as referred to in the Law.<sup>131</sup>

For example, the case in the Supreme Court Decision<sup>132</sup> which in essence reinforces the decision of the Jakarta High Court No. 14/PID/2008/PT.DKI and the decision of the North Jakarta District Court No. 1567/Pid.B /2007/PN.Jkt.Ut. In that case, there was a company employee (the defendant) who leaked the Trade Secrets of the company where he worked, in the interests of winning another company in a procurement tender. He was paid by another company in the amount of Rp 200 million and said that he had left the company where he worked.

In fact, based on company regulations, employees should be required to keep company trade secrets confidential. However, the employee commits acts that are detrimental to the company and results in the company losing the trust of its customers. Because of his actions, the judge at the High Court sentenced the employee to prison for 1 (one) year and 2 months. The Supreme Court also decided to reject the defendant's appeal.

Furthermore, in another case, the decision of the North Jakarta District Court Number 531 / Pid / B / 2012 / PN.Jkt.Utr. The Panel of Judges decided the defendant with imprisonment for 5 (five) months and a fine of Rp. 15,000,000 (fifteen million rupiah).

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<sup>131</sup> Law Number 31 of 2000 on Criminal Legal Prosedure to conduct a criminal investigations toward Industrial Design matters.

<sup>132</sup> Supreme Court Decision Number 783 K/Pid.Sus/2008

In essence, a company (PT. Biggy Cemerlang) who suspected a violation of its trade secrets reported its former employee (Hartoko) to the police. By the Public Prosecutor, the defendant is charged under Article 17 paragraph (1) in conjunction with Article 13 of the Trade Secret Law by carrying out an act "intentionally and without the right to commit an act of violating an agreement or denying a written obligation to safeguard trade secrets."

According to the Public Prosecutor, the defendant's actions were carried out intentionally and without the permission of PT. Biggy Cemerlang, namely using another party's trade secret, in which the defendant violated the provisions in the confidentiality agreement No. 001 / BC-HRD / I / 06 dated January 23, 2006 signed by the defendant and Riston Marpaung, S.H. as the HRD Manager of PT. Biggy Cemerlang at point 15 states "In the period of 2 years after the Worker is no longer an employee of the Company, Workers, both directly and indirectly or in any way, are prohibited from taking actions on business institutions that have business fields that are competitors in directly with the Company, whether as an owner, shareholder, director, commissioner, manager, employee, representative, distributor, partner or consultant, or whatever the term is, from the business institution.<sup>133</sup> In the end, the judge decides as explained above.

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<sup>133</sup> Surat Tuntutan No. Reg. Perk: PDM-217/JKTUT/04/2012.

The cases above explain that the legal consequences of violating trade secrets committed by employees in a company or who have resigned from a company within a certain period are criminal penalties. However, in the development of law in Indonesia, there has not been a decision that decided that a franchisee committing a violation of trade secrets was subject to a crime.

## **2.The Consequences of Civil Lawsuit**

Furthermore, in addition to criminal offenses, the consequences of violating trade secrets can also be subject to a civil suit namely compensation and or termination of all acts if intentionally and without the right to do the acts referred to in article 4 Law Number 30 of 2000 which states the Owner of Trade Secrets has the right to use their own Trade Secrets and / or give licenses to or prohibit other parties from using Trade Secrets or disclose those Trade Secrets to third parties for commercial purposes.

This explains that holders of trade secrets have a monopoly or exclusive right. That is, he can use his own trade secrets and give licenses to other parties or forbid anyone to use trade secrets or disclose trade secrets to third parties for commercial purposes.<sup>134</sup>

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<sup>134</sup> Djumhana dan Djuaidillah, *Hak Milik Intelektual*, Bandung, PT Citra Aditya Bakti, 2014. P. 367.

The claim for compensation itself is an attempt or action to claim rights or force other parties to carry out their duties or obligations, to recover the loss suffered by the plaintiff through a court decision. This lawsuit is an action that aims to obtain the protection of the rights granted by the court to prevent "*eigenrichting*".<sup>135</sup>

Compensation in civil law can arise due to default due to an agreement or may arise due to illegal acts.<sup>136</sup> Compensation that arises from default is if there are parties in the agreement who do not carry out the commitment that has been stated in the agreement, then according to the law they can be held liable, if other parties in the agreement suffer losses.<sup>137</sup>

Meanwhile, losses incurred by tort, are regulated in Article 1365 and Article 1366 of the Civil Code, Article 1365 of the Civil Code provides provisions regarding Unlawful Acts with "every act against the law, which incurs a loss to another person, obliges the person who due to the wrong to issue the loss. , compensate for these losses ". Other provisions set forth in Article 1366 of the Civil Code are "everyone is responsible, not only for losses caused by his actions, but also for losses due to negligence or carelessness".<sup>138</sup>

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<sup>135</sup> <http://jom.unpak.co.id>, Andi Abdurrahman Nawawi, "Tinjauan Umum Mengenai Gugatan Perdata". Accessed March 05, 2019.

<sup>136</sup> M.A. Moegni Djojodirjo, *Perbuatan Melawan Hukum*, Cetakan Pertama, ( Jakarta: Pradnya Paramita, 1979). P. 11

<sup>137</sup> Munir Fuady, *Konsep Hukum Perdata*, Cetakan Pertama (Jakarta: PT Raja Grafindo Persada, 2014), P.223.

<sup>138</sup> Soesilo dan Pramudji R, *Kitab Undang-Undang Hukum Perdata*, Cetakan Pertama (Surabaya : Rhedbook Publisher, 2008), P. 306.

Meanwhile, regarding the termination of all acts is that a defendant is required to immediately stop all his actions related to the use of trade secrets of other parties and not to repeat them in the future.

In connection with a civil lawsuit violation of trade secrets can be seen in the case of the Supreme Court Decision Number 1713 K / Pdt / 2010. In essence, PT. BPE (the plaintiff) sued PT. Hitachi (defendant) because a former employee of PT BPE made a boiler engine that had similarities with PT. BPE where the method of production and manufacture of the boiler machine is a trade secret of PT BPE. The manufacture of boiler machines carried out by PT. Hitachi after recruiting PT BPE employees has also resulted in huge losses for PT. BPE.

The claim for material and immaterial damages filed by PT BPE in the previous district court was Rp. 127,717,253,471,286 (one hundred twenty seven billion seven hundred seventeen million two hundred fifty three thousand four hundred seventy one rupiah two hundred eighty six rupiahs) and a lawsuit to stop all actions related to the use and production of trade secrets belonging to PT BPE. However, the lawsuit in district court cannot be accepted because of differences in absolute authority.

But, in its decision, the Supreme Court decided to grant the appeal and cancel the previous court's decision stating that the court was not authorized to adjudicate because of differences in the absolute competence of the court. Furthermore, the Supreme Court ordered the relevant district court to examine and adjudicate the subject matter.

In another case in the Netherlands, there was a case between Cohen vs. Lindenbaum (HR 31-01-1919, NJ 1919, 161).<sup>139</sup> in this case Cohen basically recruited employees from Lindenbaum with the promise of giving gifts and other things. The transfer of Lindenbaum employees to Cohen was utilized by Cohen, by extracting all kinds of information and data held by the employee, especially those relating to the course of Lindenbaum's operational activities, including various information regarding purchases, suppliers, sales, promotions and advertisements, customers, and pricing process. It should be noted that both Cohen and Lindenbaum are two printing companies that compete with each other. As a result of this finally Cohen sued Lindenbaum in *Arrondissementrechtbank*<sup>140</sup> in Amsterdam, on the basis of a lawsuit Cohen had committed a tort as regulated in Article 1401 Burgerlijk Wetboek Netherlands<sup>141</sup> (Article 1365 of the Civil Code<sup>142</sup>).

At the district court Lindenbaum won but when the appellate judge decided to lose, after that Lindenbaum appealed to *Hoge Raad* (Supreme Court), the judge stated that Cohen's actions were tort.<sup>143</sup> The Dutch Hoge

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<sup>139</sup> Gunawan Widjaja, *Seri Hukum Bisnis : Rahasia Dagang*, (Jakarta: RajaGrafindo Persada, 2001), P. 1-3

<sup>140</sup> District Court in Dutch Language, see: <http://en.organisasi.org/translation/district-court-in-other-languages> Accessed March 05, 2020.

<sup>141</sup> Article 1401 mention: *elke onrechmatigedaad, waardoor ann een ander schade wordt toegebracht stelt dengene door wiens shuld die schade veroorzaakt is in de verpligting om dezelve te vergoeden*". Soebekti and Tjitrosudibio translate it as follows: "Every act that violates the law, which brings harm to another person, obliges the person who because of his mistake to issue the loss, compensates for the loss".

<sup>142</sup> Isi dari Pasal 1365 KUHPerdata mentions: "Every act that violates the law brings a loss to another person, obliging the person who because of his mistake to issue the loss, compensates for the loss".

<sup>143</sup> Philipus M Hadjon, dkk, *Introduction to the Indonesian Administrative Law*, Gadjah Mada University, Yogyakarta, 1994.

Raad decision of January 31, 1919 has provided a broad understanding of the meaning and scope of tort, so that it also includes actions as carried out by Cohen in the case above.<sup>144</sup> Based on the decision given by Hoge Raad Netherlands, which shows that the disclosure of trade secret information is in fact a disclosure that can cause harm (commercially) to the owner of the information.

From some of the cases above it can be understood that the legal consequences if violating trade secrets is in the form of a civil suit for compensation or termination of an act.

### **3.The Consequences of Unfair Business Competition**

Competition is an inseparable part of the life faced by entrepreneurs, especially in the franchise business to achieve its goal of getting the maximum profit and outperforming other companies and maintaining the profitability.<sup>145</sup> In achieving these goals, unfair competition practices often occur which can lead to conflict between one entrepreneur and another entrepreneur.<sup>146</sup> One of these practices is stealing Trade Secrets belonging to other companies.<sup>147</sup>

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<sup>144</sup> Gunawan Widjaja, Op. Cit.

<sup>145</sup> Porter, M.E., Competitive Advantage, Free Press, New York, 1985

<sup>146</sup> Agus Broto Susilo, Dkk, Laporan Akhir Tim Analisa Dan Evaluasi (Ae) Tentang Rahasia Dagang (UU Nomor 30 Tahun 2000), Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Hak Asasi Manusia RI Tahun 2010.

[https://www.bphn.go.id/Data/Documents/Rahasia\\_Dagang.Pdf](https://www.bphn.go.id/Data/Documents/Rahasia_Dagang.Pdf), Accessed March 6, 2020.

<sup>147</sup> Ibid.

The theft of trade secrets belonging to other companies is closely related to Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter mention as Law Number 5 of 1999) especially in the provisions of article 23 which states "Business actors are prohibited from conspiring with other parties to obtain information on competitors' business activities which are classified as company secrets so as to result in unfair business competition. "

Article 23 prohibits business actors from engaging in collusion with other parties to obtain information regarding competing business activities classified as company secrets. The approach used in Article 23 is the rule of reason approach that looks at and observes the impact or effects that result from the conspiracy on competition.<sup>148</sup> The provisions of article 23 itself aim to provide protection to business actors whose existence or presence in the market is highly dependent on the trade secrets they have.<sup>149</sup>

One of the cases that can be studied in this case is the Decision of the Business Competition Supervisory Commission (KPPU) Number: 35 / Kppu-I / 2010 Regarding the Practice of the Donggi Senoro Project Beauty Contest,<sup>150</sup> which in essence KPPU determined PT Pertamina (Persero), PT Medco Energi Internasional, Tbk, PT Medco E&P Tomori Sulawesi and Mitsubishi Corporation were proven to have conspired to obtain

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<sup>148</sup> Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia dalam teori dan Praktik serta Penerapan Hukumnya*. Cetakan pertama, Jakarta: Kencana Prenada Media Group, 2012. P. 271

<sup>149</sup> Ibid

<sup>150</sup> See: Putusan Komisi Pengawas Persaingan Usaha Nomor : 35/Kppu-I/2010 Tentang Praktek Beauty Contest Proyek Donggi Senoro, [https://www.kppu.go.id/docs/Putusan/putusan\\_35\\_2010\\_Donggi%20senoro.pdf](https://www.kppu.go.id/docs/Putusan/putusan_35_2010_Donggi%20senoro.pdf)



confidential information from LNGEU through the due diligence activity which was used as a material for Mitsubishi Corporation in preparing proposals both before as well as during the beauty contest so that the reported parties are subject to article 23 of Law Number 5 of 1999.

On the other hand, in the context of franchising, article 50 letter b of Law number 5 of 1999 excludes IPR agreements, relating to licenses, patents, trademarks, copyrights, industrial product designs, integrated electronic circuits, and trade secrets, and related agreements with franchising, from the application of Law No. 5 of 1999. Exceptions are intended so that the franchisor can determine their own use of rights. Requirements in the franchise agreement that aim to protect the characteristics of the business, service standards and goods and / or services and reputation of intellectual property rights may be subject to an exception under Article 50 letter b.<sup>151</sup>

However, in certain cases such as the determination of selling prices, territorial restrictions and others, the exemption does not apply. The author believes that in a franchise agreement if the franchisee breaches (reveals Franchisor's trade secrets) to competitors with the same type of business that causes unfair business competition, the exception should not apply.

Meanwhile, sanctions given to individuals or business entities and franchisees who violate the provisions of Article 23 are administrative sanctions in the form of:

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<sup>151</sup> See: [https://www.kppu.go.id/docs/pedoman\\_pasal\\_50b.pdf](https://www.kppu.go.id/docs/pedoman_pasal_50b.pdf)

- a) *Penetapan pembatalan perjanjian kepada pelaku usaha yang melakukan perjanjian tertutup*
- b) *Perintah kepada pelaku usaha untuk menghentikan kegiatan yang terbukti menimbulkan praktek monopoli dan atau menyebabkan persaingan Usaha tidak sehat dan atau merugikan masyarakat.*
- c) *Penetapan pembayaran ganti rugi*
- d) *Pengenaan denda serendah-rendahnya Rp. 1.000.000.000,00 (satu milyar rupiah) dan setinggi-tingginya Rp. 25.000.000.000,00 (dua puluh lima milyar rupiah).<sup>152</sup>*

From the explanation above, it can be understood that the legal consequences if a trade secret violation occurs is not only in the form of a civil suit for compensation or termination of an act and criminal charge but also has an impact on monopoly and unfair competition among the company.

## **B. How are the Legal Protection of the Franchisor's Trade Secret in Franchise Agreement**

### **1. Legal Protection in Franchise Agreement: a case study of the North Jakarta District Court Decision Number 413/Pdt.G/2014/PN.JKT.UTR.**

To be able to run a franchise business, especially in the field of food and beverages, the business to be franchised must have the criteria set out in Government Regulation No. 42 of 2007, which has the characteristics of a business, is proven to provide benefits, has a standard of goods and services

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<sup>152</sup> See: Article 47 Law Number 5 of 1999 on Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat

made in writing, can be applied, there is continuous support, and registered intellectual property rights.<sup>153</sup>

In a company, trade secrets become a valuable corporate asset and confidentiality must be maintained because that's where the profits grow. If the secrecy is revealed by other parties, both those carrying out similar and unequal trades, the loss and confidentiality of the information will be lost so that it will no longer be a trade secret.

The importance of a trade secret in the franchise business, has the potential to lose a secret that can be caused by the absence of preventive measures in maintaining a confidentiality. The franchisor must take precautions to protect a trade secret in his franchise system.<sup>154</sup>

Protection of trade secrets in a franchise business is carried out based on the agreed franchise agreement wherein the franchise agreement states that intellectual property originating from the franchisor is the right of the franchisor as the secret owner and the franchisee is obliged not to divulge or violate the intellectual property rights of the franchisor protected.<sup>155</sup>

The example of cases relating to violations of trade secrets in Indonesia is the North Jakarta District Court Decison Number 413 /Pdt.G/2014/PN.JKT.UTR between Komala's International PTE LTD (Komala's) a company established under Singapore law that is positioned as a

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<sup>153</sup> Bella Katrina Sari, Loc. Cit, P. 90

<sup>154</sup> Agustina Kadek D, Nurmawati N, "Perlindungan Hukum Terhadap Rahasia Dagang Dalam Usaha Franchise Di Bidang Makanan Dan Minuman, Kertha Semaya" : Journal Ilmu Hukum, [S.l.], v. 6, n. 11, p. 1-15, july 2019. ISSN 2303-0569. Available at: <<https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/53299>>.

<sup>155</sup> Ibid.

plaintiff and Franchisor against PT Graha Bhakti Semesta (GBS) a limited liability company established under Indonesian law which is positioned as a defendant and franchisee. Initially, PT Graha Bhakti Semesta officially became the recipient of this Komala's franchise since the signing of the franchise agreement on August 2, 2003 and began opening the first outlet at Sarinah Building, Jakarta on April 29, 2004. Since the signing of this Komala's franchise agreement, PT Graha Bhakti Semesta has rights and obligations that must be fulfilled, one of which is to keep Franchisor's trade secrets and not compete in the same business for a certain period of time.

Furthermore, the term of this agreement is for 10 (ten) years, which means the franchise agreement expires on August 1, 2013 and can be extended, however, GBS does not use its right to submit a letter to renew the agreement so that the franchise agreement automatically ends.

However, after the agreement ended, GBS did not stop the operation of its Komala restaurant outlet. In fact, GBS changed the name of the Komala Restaurant to a Vegetarian Restaurant and continued to use the Komala Restaurant system such as serving food that is typical of Komala Restaurant, namely vegetarian food, the methods of implementation, marketing, promotion and methods of the komala restaurant system in running the restaurant outlets.

Whereas in the franchise agreement after the expiry of the franchise agreement, GBS is prohibited from competing in the same business with Komala Restaurant for 24 (twenty four) months since the Agreement expires

as provided for in Article 22 paragraph 4 of the Agreement and also all license rights including trade secrets that The Plaintiff has given to the Defendant pursuant to the Franchise Agreement as well as ending, and the Defendant is obliged to stop all activities of the Defendant's restaurant outlet business that uses the Komala's System (trade secret). Article 25 paragraph 1 and 2 of the Franchise Agreement states as follows:<sup>156</sup>

1. “Upon termination or expiration of this Agreement, all rights granted to the Franchisee under this Agreement shall immediately terminate, and the Franchisee shall immediately cease to operator the Outlets under the System .....
2. The Franchisee shall immediately and permanently cease to use, in any manner whatsoever, any trade secrets, confidential methods, procedures, and techniques associated with the System in the Territory or elsewhere ...;”

In addition, GBS also violates the provisions of article 25 paragraph (9) of the Franchise Agreement because after the Franchise Agreement has ended, until the lawsuit is filed, the Defendant has not returned all copies of the manual, including any translated copies of the Manual and other copies, even though the manual copy is included in the Komala's trade secrets governing production methods, operational systems, etc.

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<sup>156</sup> See: Distric Court of North Jakarta Decision Number 413/Pdt.G/2014/PN.JKT.UTR

The article 25 paragraph (9) states: “The Franchisee shall immediately deliver to the Franchisor all copies of the Manual, including any translated copies of the Manual and other copies ...”<sup>157</sup>

Furthermore, Komala's has several times rebuked and reminded GBS to immediately stop using the Komala Restaurant System and return all copies of the Komala Restaurant System manual referred to, among others, through Letter No. CBB 166.13.ye dated 19 February 2014, Letter No. 153 / PP-ltr-gp / VI / 2014 dated June 20, 2014 and Letter No. 177 / PP-ltr-gp / VII / 2014 dated 4 July 2014 sent to the defendant. However, until the lawsuit was filed, GBS had not stopped the activity of using trade secrets and had not returned copies of the manual to the franchisor, so the franchisor suffered material losses and immaterial losses.

As for the defendant's answer, the GBS postulated and challenged Komala's to prove what violation of trade secrets were committed by the Defendant because the defendant stated that the plaintiff did not explain in detail about the trade secrets.

In the end, the judge decided and stated that the dispute was not the relative authority of the North Jakarta District Court because in the agreement it was stated that the choice of law and the forum were in Singapore. However, the case shows that there are violations of trade secrets that actually occur in people's lives, especially in the relationship agreement between the Franchisor and Franchisee.

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<sup>157</sup> Ibid

1. Comparative case of legal protection in Franchise Agreement: case study of the United States District Court of Minnesota decision<sup>158</sup> between RPC Acquisition Corp v J&D World Corp, Tyler Hyunh and Nghia Trinh Huynh.

Initially, after the franchise agreement ended J&D World Corp, represented by Tyler Hyunh and Nghia Trinh Huynh (defendant and Franchisee), continued to use patents, trademarks (goodwill) and Business System (trade Secret) owned by RPC (plaintiff and Franchisor), under the brand name Pro-Cuts. This is explained in Article 11.2 of the franchise agreements, Defendants agreed that: *“[u]pon expiration or termination of this Agreement for any reason, the FRANCHISEE’s right to use the name Pro-Cuts®, the other Marks and the Business System will terminate immediately.”*

In addition, the defendant also did not return the information obtained during the franchise agreement to RPC and the defendant refused to provide access to the plaintiff's books and records. The Defendant also continued to run his business in four areas owned by RPC while still using the Pro-Cuts business system even though Article 12.3 of the Franchise Agreement stated that, Defendants agreed that they would not:

*“[for] or a period of two (2) years after the termination or expiration of this [Franchise] Agreement, on their own account or as an employee, agent, consultant, partner, member, officer, director or shareholder:*

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<sup>158</sup> United States District Court of Minnesota decision Number 0: 2013cv01400 between RPC Acquisition Corp v J&D World Corp, Tyler Hyunh and Nghia Trinh Huynh

*(a) seek to employ any person who is at that time employed by [RPC] or by any other Pro-Cuts® franchisee or Regis business, or induce any such employee to terminate his or her employment or*

*(b) own, operate, lease, franchise, conduct, engage in, be connected with, have any interest in or assist any person or entity engaged in any hairstyling, barber or other business that is in any way competitive or similar to the Pro-Cuts businesses conducted by [RPC] or [RPC's] franchisees, which is located within six (6) miles of either the Franchised Location or of PRO-CUTS' franchisees."*

Based on the dispute, the panel of judges gave a verdict that the plaintiff's claim was granted. In addition, the defendant had previously signed an anti-competition agreement whereby the defendant could not open a business in the plaintiff's franchise area, and the defendant was considered guilty, for not returning the plaintiff's documents and data after the agreement ended.

Therefore, to the defendant, the panel of judges ordered the return of all confidential information held by the plaintiff. Defendants are also required to comply with the rules regarding location and attract employees to the defendant's place of business in accordance with the franchise agreement. This is related to competitive matters or competition. So that the business of the defendant and the plaintiff does not compete with each other.

Then the panel of judges also decided that the defendant should not use any names or slogans similar to Pro-Cuts. Besides that, the defendant was ordered to paint the interior walls in a very different color, giving a different design and interior to those of Pro-Cuts so that later it would not be confusing Public.



## **2. Analysis of decisions and recommendations on legal protection of the franchisor's trade secrets in the franchise agreement.**

Based on article 3 (1) Law Number 30 of 2000 explains the trade secret characteristic are:

1. The information includes technology or business commercial
2. Information that is not publicly known
3. Has economic value that is useful in business activities
4. Confidentiality is maintained by the owner.

The technology referred to in Article 3 paragraph (1) is the process of making products or production methods, while the word business contains a very broad meaning covering both processing methods, sales patterns, distribution patterns, marketing strategies, manual guidelines, food recipes, operational systems in carrying out business and other things that are considered unique and valuable.<sup>159</sup>

In the above case it can be seen that GBS violated Komala's trade secrets in the form of the method of implementation, marketing, promotion and methods of the commala restaurant system in running the restaurant outlets as regulated trade secret characteristics. In addition, GBS has not returned all copies of the manual, including every translated copy of the Manual and Other copies, even though the copy of the manual is included in Komala's trade secrets governing production methods, system operations, etc.

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<sup>159</sup> Gunawan Widjaya, Op., Cit. P.81

Furthermore, Komala's restaurant trade secrets are only known by Komala's and its franchisees (Information that is not publicly known) and have economic value as evidenced by compensation claims worth hundreds of millions of rupiah. In addition, there are efforts to maintain confidentiality by the franchisor with a written agreement between the franchisor and the franchisee. That means, Komala's has fulfilled the elements of trade secrets and need to be protected.

Forms of legal protection for the trade secrets of the franchisor in principle can be grouped into Preventive (preventive) and Repressive (actions or efforts taken / taken after legal consequences). Preventive forms of legal protection of trade secrets can be made through the making of a franchise agreement. This is because agreements can be a strong legal basis for enforcing legal protection for the parties.<sup>160</sup> Therefore the agreement must be made in accordance with the legal rules of the contract or the agreement in accordance with applicable law.

The applicable law is Government Regulation Number 42 of 2007, which states that the Franchise Agreement must contain at least several clause: <sup>161</sup>

- a. names and addresses of parties;
- b. type of Intellectual Property Rights;
- c. business activities;
- d. the rights and obligations of the parties;

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<sup>160</sup> Bella Katrinasari, Op., Cit.

<sup>161</sup> See: Article 5 Government Regulation Number 42 of 2007

- e. assistance, facilities, operational guidance, training, and marketing provided by the Franchisor to the Franchisee;
- f. business area;
- g. duration of the agreement;
- h. the procedure for payment of benefits;
- i. ownership, change of ownership, and heir rights;
- j. dispute resolution; and
- k. procedure for extension, termination and termination of the agreement.

The regulation provides guidance on what clauses should be in the franchise agreement, but according to the author there are several important clauses, which must be added to protect Franchisor's trade secrets, namely:

1. Non-disclosure agreement clause
2. Non-competition clause
3. Non-solicitation clause
4. And supervision clause

In the above case the non-disclosure agreement clause is stated but only limited to the termination of the agreement, the non-disclosure agreement clause should also be applied during the agreement and also state that the franchisee recognizes the franchisor's secret franchise rights and has gained access to the franchisor's trade secrets. and will not disclose it to third parties.

Furthermore, in the non-disclosure clause must determine the management of the franchisee company that may or may not know the secret, restrictions on the

franchisee in using trade secrets, and sanctions that can be prosecuted to the franchisee if these obligations are violated.<sup>162</sup>

In a comprehensive framework, protection of trade secrets through a non-disclosure clause must include the following:

a. Identification of data or information that has the potential to become a trade secret.

b. Making a comprehensive franchise agreement, the agreement must contain an agreement to protect trade secrets. The trade secret protection agreement is not only at the end of the agreement but also when the agreement takes place to prevent competition.

c. Internal protection such as using a password to access a company computer, storing important documents in a safe, putting a "confidential" sign on a document, controlling documents and production equipment and so on.<sup>163</sup>

Basically, the Franchisee as the recipient of confidential data both directly and indirectly has the obligation not to disclose the secret in order to continue the business that he will run.<sup>164</sup> If the Franchisor has not made arrangements regarding Franchisee's obligation to maintain confidentiality, automatically the Trade Secret Act as one of the legal regulations on intellectual property rights in Indonesia will protect the confidentiality of data in the business..<sup>165</sup>

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<sup>162</sup> Basarah, Moch. dan M. Faiz Mufidin. *Bisnis Franchise dan Aspek-Aspek Hukumnya*. Bandung : PT. Citra Aditya Bakti. 2008.

<sup>163</sup> Jesselyn, Perlindungan Hukum Bagi Pewaralaba Atas Kerahasiaan Data Dalam Perjanjian Waralaba Berdasarkan Undang-Undang Nomor 30 Tahun 2000 Tentang Rahasia Dagang, <http://repositori.usu.ac.id/handle/123456789/11198>, accessed March 10, 2020.

<sup>164</sup> Rena Puspita Putri, Skripsi, "Klausula Kerahasiaan (Confidentiality Clause) dalam Perjanjian Waralaba (Franchise)", (Surabaya : Program Ilmu Hukum Universitas Airlangga, 2014), P. 58

<sup>165</sup> Ibid

Second, the non-competition clause. This clause aims to protect the company's trade secrets from competitors. With the inclusion of a non-competition clause it is expected that the franchisee will not divulge trade secrets or all confidential information to competing companies.<sup>166</sup>

In the case of Komala's, it can be seen that the non-competition clause provisions have been fulfilled by the prohibition of competition for 24 months as well as the RPC Acquisition Corp v. J&D World Corp but it is better when the agreement will expire, the franchisor provides notification so that the franchisee does not compete and use franchisor's trade secrets.

Third, the non-solicitation clause. Basically, this clause is often applied in work agreements but does not rule out the possibility to apply also in franchise agreements As in the case of RPC Acquisition Corp v J&D World Corp which has been explained above. The non-solicitation clause is an agreement not to solicit either (a) employees or (b) customers of a business and (c) trade secret from current job.<sup>167</sup>

In this clause, the franchisee is prohibited from recruiting franchisor employees or taking customers from the franchisor with the aim or potential to obtain the franchisor's trade secrets.<sup>168</sup> With this clause, it will prevent violations of the franchisor's trade secrets.

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<sup>166</sup> Jened, Rahmi, Perlindungan "Trade Secret" (Rahasia Dagang) Dalam Rangka Persetujuan Trade Related Aspects Of Intellectual Property rights (TRIPs), Yuridika, Vol. 14 No. 1, Januari – Februari 1999. Unair-Surabaya, 1999.

<sup>167</sup> David L. Jhonson, The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants, 28 ABA JOURNAL OF LABOR & EMPLOYMENT LAW 99 (2012) , P. 99.

<sup>168</sup> Elizabeth E. Nicholas, Drafting Enforceable Non-Solicitation Agreements in Kentucky, 95 Ky. L.J. 505, 508 (2006).

Fourth, supervision clause. In a franchise agreement, a supervision clause must be arranged<sup>169</sup> to ensure that the outlet's operations are truly in line with operational standards and to ensure that no trade secret violations occur such as changing food recipes, changing trademark and production method errors, etc.

Next, the illustration or example of the supervision clause is as follows:

#### 1. Supervision

1.1 Franchisors can inspect each outlet at any time based on franchisor policy

1.2 Franchisor is given the widest freedom to inspect the franchisee, as long as it does not conflict with the provisions of the law

1.3 In case of supervision found a violation of the contents of the contract made by the franchisee, the franchisor can give a written warning to the franchisee

1.4 After the warning is sent by the franchisor to the franchisee, the franchisee is obliged to carry out the contents of the reprimand submitted by the franchisor from the results of the inspection and supervision he does.

1.5 In the event that the franchisee does not carry out the contents of the warning as referred to above within a period of no later than 7 (seven) days from receipt of the warning, the franchisee shall be subject to sanctions as stated in the point ..... contract

Supervision in the franchise activities is seen not only the arrangement of the agreement but also the implementation of the agreement.<sup>170</sup> This supervision can

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<sup>169</sup> Kadushin, A., & Harkness, D. (2002). Supervision in social work. New York: Columbia University Press.

<sup>170</sup> Philip F Zeidman, Franchise in 32 Jurisdiction Worldwide, (London: Law Business Research Ltd, 2011), P. 201

be carried out within a certain period, but it also does not rule out the possibility if done suddenly to protect the interests of the franchisor.

Apart from the agreement, preventive trade secret protection can be in the form of giving a semi-finished recipe if the franchise is engaged in food and beverage such as Komala's case. It is better if the Franchisor, as the recipe owner, does not immediately give away trade secrets in the form of the recipe as a whole, but only gives the semi-finished recipe ready for processing to the franchisee.<sup>171</sup>

In addition to being preventive, protection of trade secret law can also be done in a repressive manner. Repressive legal protection can be in the form of a civil suit in the form of compensation and termination of all acts while criminal prosecution according to the author can be made to the subject of "individuals" or organs of franchisee companies that violate trade secrets.

In addition to the settlement of disputes through the court as mentioned in article 12 of Law Number 30 of 2000, it is possible to have a non-court settlement. meaning that it can be through arbitration or an alternative dispute resolution. Resolved through arbitration, conciliation, mediation, negotiation. Some of these alternative dispute resolutions often result in a win-win solution because they can be determined by both parties even without rules that are sometimes rigid. And alternative solutions to dispute resolution are sometimes a reflection of the original cultural sociology of our society which puts forward resolution through deliberation to reach consensus.<sup>172</sup>

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<sup>171</sup> Indira Swasti Gama Bhakti, "Rahasia Dagang dalam Usaha Franchise di Bidang Kuliner", Jurnal Fakultas Ilmu Sosial dan Ilmu Politik Universitas Tidar, Vol. 1, No.1, 2017, Magelang

<sup>172</sup> Tommi Ricky Rosandy, Op. Cit.

## **C. How are the Legal Protection of the Franchisor's Trade Secret in Work Agreement**

### **1. Legal Protection in Work Agreement: Case Study of Bekasi District Court's Decision Number: 202/Pdt.G/2010/PN/Bks.**

Employees are the main factor in a business, employees are the movers of a company that must obtain legal certainty and welfare.<sup>173</sup> Employees who have a direct role in using trade secrets have many loopholes without the right to use trade secret rights. Every time an employee who plays a role in maintaining trade secrets quits his job then without a clear and strong binding employment relationship, trade secrets can be feared to be lost.<sup>174</sup>

The application of trade secret protection in work agreements in Indonesia can be seen through the court's decisions on cases in Indonesia. For example, in Bekasi District Court Decision Number: 202 / Pdt.G / PN / Bks regarding tort between PT. Aneka Harapan Realindo as the franchiser of Ray White Harapan Indah Bekasi (Plaintiff) against Fitriyani, former marketing executive (ME) Ray White Harapan Indah Bekasi (Defendant-I) and Martalina Gunawan, former manager of Ray White Harapan Indah Bekasi (Defendant-II).

The main subject of the dispute in this civil case is the Plaintiff's claim against the Defendants due to tort committed by the Defendants on the basis

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<sup>173</sup> Wildan, M. (2017). "Perlindungan Hukum Tenaga Kerja Kontrak Dalam Perjanjian Kerja Waktu Tertentu Berdasarkan Undang-Undang No. 13 Tahun 2003 Tentang Ketenagakerjaan." *Jurnal Hukum Khaira Ummah*, 12(4), 834.

<sup>174</sup> Kopko, A. J. (1964). "Protection of Trade Secrets in the Employer- Employee Relationship." *Notre Dame Law Review Article*, 39(2), 200.



of the violations committed by the Defendants against the franchise agreement between the Plaintiff and the Defendants dated March 1, 2008 with Defendant-I, and the dated September 3, 2007 with Defendant-II as set forth in the company's franchise agreement with Ray White.

The agreements that were violated are as follows:

- To follow the rules in the company's franchise agreement and the franchisor's policy and work guidelines in terms of real estate implementation.

- All forms of listings obtained during the period of employment at the company are in the name and ownership exclusively by the company and will not do anything that will cause real estate agents to obtain or use these listings for a period of six months after termination of employment.

- Will not interfere with or attempt to attract fellow marketing executives in the company office within 12 (twelve) months after the cancellation of this agreement.

- Does not work for a similar company within a period of 12 (twelve) months after the cancellation of this agreement.

The dispute starts at the end of the franchise agreement between the plaintiff and the defendant in which the defendant creates a new company of the same type in a period of less than 12 (twelve) months. In addition, the defendant also invited the plaintiff's employees to work in the defendant's company and used the Plaintiff's Company Listing, which was one of the

plaintiff's trade secrets so that the plaintiff sued the court on the grounds of tort violation of the trade secrets of the defendant's company.

In the answer, the defendant rejected the arguments submitted by the plaintiff because the defendant felt not responsible for the franchise agreement, but the defendant stated that if the defendant violated the work agreement (not a franchise agreement) the lawsuit should have been a default rather than tort.

Finally, the Panel of Judges in their deliberation meeting on January 17, 2011 decided that the plaintiff's claim could not be accepted (*Niet Onvankeleike verklaard*) with consideration of 13 (thirteen) pieces of evidence submitted by the plaintiff, none of which proved the plaintiff was the owner of the franchise trade secret. Furthermore, in fact the plaintiff is not the owner of the trade secrets of the franchise business because the plaintiff's position is the Franchise Recipient (franchisee) while, the actual Franchise Owner is Ray White Company, so the plaintiff does not have the capacity to file a claim.

In addition, the judge considers that the agreement between the plaintiff and the defendant claimed by the plaintiff as a franchise agreement is not a franchise agreement but the agreement is a work agreement that is reflected as a franchise agreement.

## **2. Analysis of decisions and recommendations on legal protection of franchisor trade secrets in work agreements.**

The case above shows there are legal events that can be understood. That efforts to protect trade secrets in addition to using a franchise agreement can also be through work agreements. Protection of trade secrets is very important in working relationships between owners and employees. To prevent the disclosure of trade secrets, owners of trade secrets often need work agreements or employment contracts to provide alternative trade secret protection.<sup>175</sup>

The employment contract is one of the agreements to carry out work as in Article 1601 of the Civil Code.<sup>176</sup> Furthermore, Article 1 number 14 of the Manpower Act<sup>177</sup> provide a definition that is a work agreement is an agreement between the worker / laborer and the employer that contains the conditions of work conditions, rights, and obligations of the parties. Therefore, to provide legal protection for trade secrets in an work agreement, it must provide clarity of rights and obligations for parties related to trade secret rights, such as the owner of trade secrets as well as the third party licensee and employee. In addition, the work contract must be based on justice so that the rights and obligations of each party are fulfilled.<sup>178</sup>

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<sup>175</sup> Garry, P. (1985). The Relationship Between work agreements and Trade Secret Litigation in Minnesota : The Evolution of Trade Secret Law from Cherne to Electro-Craft. *William Mitchell Law Review*, 11(2), 501.

<sup>176</sup> Mahila, S. Op. Cit.

<sup>177</sup> See: Law Number 13 of 2003 on Man Power

<sup>178</sup> John Rawls. (1985). Justice as Fairness : Political not Metaphysical. *Philosophy and Public Affairs*, 14(3), 235. <https://doi.org/10.1177/1066896913509009>

In the above case, it can be seen that prior to the decision by the judge, it is unclear whether the agreement between the plaintiff and the defendant is a franchise agreement or work agreement so that there needs to be clarity about the form of the agreement and also the position of the parties whether as a franchisee, franchisor or employee.

In addition to the franchise agreement, in maintaining the confidentiality of trade secrets, non-disclosure agreement must also be applied in a work agreement with employees / contract of employment. The non-disclosure agreement clause in the work agreement must be able to facilitate the provisions stating that the employee acknowledges that in his period of time, the company will provide employees access to company trade secrets, customer lists, marketing plans, financial information and other confidential information related to the company's business, including access to company work manuals.<sup>179</sup> Employees in this case agree to maintain the confidentiality of confidential information and do not use the confidential information on their own behalf or disclose the confidential information to third parties during or at the time after the employee's employment period without written permission from the company.<sup>180</sup>

In addition, the non-competing clause in work agreements with employees also becomes an important clause to protect trade secrets.

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<sup>179</sup> Muhammad Faisal, skirpsi, *Tinjauan Yuridis perjanjian rahasia dagang dalam perjanjian waralaba*, Fakultas Hukum, Universitas Indonesia, Jakarta. 2012. P. 63.

<sup>180</sup> McKenzie, Raymond. "What are the Differences between a Non-Compete Agreement, Non-Disclosure Agreement and Non-Solicitation Agreement". from: <http://www.marylandlawblogger.com/2009/06/what-are-the-differences-between-a-non-compete-agreement-non-disclosure-agreement-and-non-solicitation-agreement/>, Accessed March 07, 2020.

Non-Competiton Clause itself is essentially a clause regulating that within a certain period of time after termination of employment, workers declare their willingness not to work in companies that are considered competitors in a certain period of time.<sup>181</sup>

In the case, in fact the defendant did not work for another company of the same type but the defendant created a similar company and used the trade secrets of the plaintiff's franchiser to operate his company. This means that the arrangement does not work in a competitive company is not enough to protect trade secrets without the arrangement not to establish a similar company within a certain period.

The addition of a non-solicitation clause is also needed to protect trade secrets. In the case, Defendant 1 invited Defendant 2 to work in his place, in which Defendant 2 knew the trade secrets of the plaintiff's franchiser so that there was a potential for violation and should be prevented through a non-solicitation agreement.

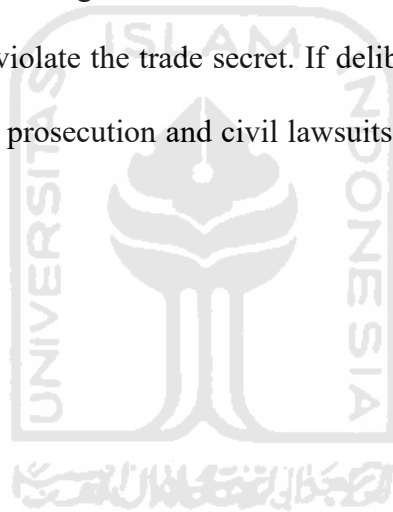
The clause provisions in the work agreement must be applied by both the franchisor and the franchisee to their employees. Furthermore, if there is a violation in the employment contract by the employee, the capacity of the parties and the legal basis used in filing the claim should be noted so that the judge does not decide the claim is unacceptable (*Niet Onvankeleike verklaard*) as in the case above because the plaintiff does not have the capacity to file a claim civil.

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<sup>181</sup> Hendry Campbell Black, Black's Law Dictionary, (United State of America: West Publishing Co, 1987).

On the other hand, the lawsuit of the Bekasi District Court was based on the breach of the franchisor's trade secrets by former franchisee employees. The one who should have acted as the plaintiff in the case was PT White Ray as the holder of trade secret rights over the real estate franchise instead of PT Aneka RealIndo as the franchisee so that his capacity as plaintiff was not doubted by the judge.

The last one, the repressive protection of trade secret law can be done through consultation and negotiation in advance so that employees can return and stop all acts that violate the trade secret. If deliberations and negotiations do not work, criminal prosecution and civil lawsuits can be made to the court as explained above.



## **CHAPTER IV**

### **CONCLUSION AND RECOMMENDATION**

#### **A. Conclusion**

Along with the development of the franchise business in Indonesia, franchisors or franchisees often do not pay attention to the intellectual property contained in the franchise business, such as protection of trade secrets. In fact, aspects of intellectual property such as trade secrets are the most important aspects of the business. Breaches of Franchisor's trade secrets are often carried out in franchise agreements and work agreements by franchisees and employees.

Violation of trade secrets has several legal consequences, i.e: the consequences of criminal charge, the consequences of civil lawsuit for compensation or termination of an act, and the consequences of unfair business competition.

The consequences of criminal charge, as stated in Law No. 30 of 2000 can be sentenced to a maximum imprisonment of 2 years and/or a maximum fine of Rp. 300,000,000.00. and the criminal acts is constitute complaint offense so it is not an ordinary offenses. An investigation can only be carried out if there is a complaint from the rightful party, namely the right holder or recipient of trade secret rights.

Further, the consequences of civil lawsuit for compensation is an attempt or action to claim rights or force other parties to carry out their duties or obligations, to recover the loss suffered by the plaintiff through a court decision. Meanwhile,

regarding the termination of all acts is that a defendant is required to immediately stop all his actions related to the use of trade secrets of other parties and not to repeat them in the future.

Furthermore, for the consequences of unfair business competition. Article 23 Law Number 5 of 1999 prohibits business actors from engaging in collusion with other parties to obtain information regarding competing business activities classified as company secrets. The approach used in Article 23 is the rule of reason approach that looks at and observes the impact or effects that result from the conspiracy on competition. Moreover, violation of this article can be sanctioned by KPPU as administrative sanction.

Meanwhile, in the context of legal protection of trade secret franchisors there have been a number of cases that occurred as in 2014 there was a verdict by the court in the case of Komala restaurant in its agreement with PT Graha Bhakti Semesta basically when the contract expires, GBS may not compete in the same business for 24 (twenty four) months after the franchise agreement expires. However, not long after 24 (twenty four) months since the end of the Komala franchise agreement, GBS changed the name of the Komala Restaurant to a Vegetarian Restaurant and continued to use the Komala Restaurant system such as serving food that is typical of Komala Restaurant, namely vegetarian food, the method of implementation, marketing, promotion and methods of the Komala restaurant system in running the restaurant outlets.

Although, in the verdict, the judge stated that the dispute was not a relative authority of the North Jakarta District Court because in the agreement it was



stated that the choice of law and the forum were in Singapore. However, it can be concluded that in the main matter there has been a violation of trade secrets committed by the GBS.

In addition to franchise agreements, violations of trade secrets are also often carried out by employees of franchise companies in work agreements, such as the Bekasi District Court Decision regarding tort between PT. Aneka Harapan Realindo as Ray White Harapan Indah Bekasi (Plaintiff) franchiser against its employees.

In that case the plaintiff's employee was sued for using the plaintiff's trade secrets in the form of executive listing and open listing. In addition, the plaintiff's employees also compete in the same business, which in the work agreement there is a prohibition not to compete in a certain period of time

Finally, the judge decided that the plaintiff's claim was unacceptable (N.O) on the grounds that the plaintiff did not have the capacity to file because in fact the plaintiff was a franchisee rather than a franchisor and should have filed a lawsuit in the case was the franchisor. In that case, there is a legal event that the potential breach of the franchisor's trade secrets not only occurs in the franchise agreement, but also in the work agreement.

## **B. Recommendation**

There are 2 (two) forms of legal protection for franchisor trade secrets, namely preventive protection and repressive protection. The form of preventive legal protection can be done through agreements:

### **1. Franchise Agreement**

The recommendation in the franchise agreement is to include Non-disclosure clause, Non-competition clause Non-solicitation clause and supervision clause. Furthermore, in the non-disclosure clause must determine the management of the franchisee company that may or may not know the secret, restrictions on the franchisee in using trade secrets, and sanctions that can be prosecuted to the franchisee if these obligations are violate.

Second, Non-Competiton Clause essentially a clause regulating that within a certain period of time after termination of employment, workers declare their willingness not to work in companies that are considered competitors in a certain period of time.

Third, the non-solicitation clause. Basically, this clause is often applied in work agreements but does not rule out the possibility to apply also in franchise agreements As in the case of RPC Acquisition Corp v J&D World Corp. The non-solicitation clause is an agreement not to solicit either (a) employees or (b) customers of a business and (c) trade secret from current job.

In this clause, the franchisee is prohibited from recruiting franchisor employees or taking customers from the franchisor with the aim or potential to obtain the franchisor's trade secrets. With this clause, it will prevent violations of the franchisor's trade secrets.

Fourth, supervision clause. In a franchise agreement, a supervision clause must be arranged to ensure that the outlet's operations are truly in line with operational standards and to ensure that no trade secret violations occur such

as changing food recipes, changing trademark and production method errors, etc

Apart from the agreement, preventive trade secret protection can be in the form of giving a semi-finished recipe if the franchise is engaged in food and beverage such as Komala's case. It is better if the Franchisor, as the recipe owner, does not immediately give away trade secrets in the form of the recipe as a whole, but only gives the semi-finished recipe ready for processing to the franchisee.

Meanwhile, in the context of repressive legal protection can be done with a criminal charge to the organ of the franchisee company and civil lawsuit for compensation or termination of an act.

## 2. Work Agreement

The recommendation in a preventive work agreement is to include Non-disclosure clause, Non-competition clause Non-solicitation clause in the agreement. Meanwhile, in the context of repressive legal protection can be done with a criminal charge and civil lawsuit for compensation or termination of an act.

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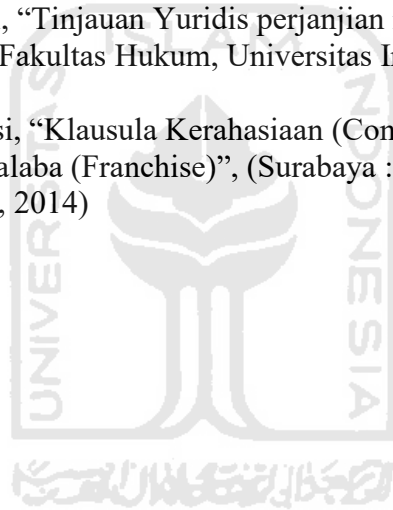
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## APPENDIX



### SURAT KETERANGAN BEBAS PLAGIASI

No. : 180/Perpus/20/H/VI/2020

*Bismillaahirrahmaanirrahaim*

Yang bertanda tangan di bawah ini:

Nama : **Ngatini, A.Md.**  
NIK : **931002119**  
Jabatan : **Kepala Divisi Perpustakaan Fakultas Hukum UII**

Dengan ini menerangkan bahwa :

Nama : Muhammad Faishal Al Fadhil  
No Mahasiswa : 16410546  
Fakultas/Prodi : Hukum  
Judul karya ilmiah : LEGAL PROTECTION OF FRANCHISOR TRADE SECRET IN  
FRANCHISE AND WORK AGREEMENT

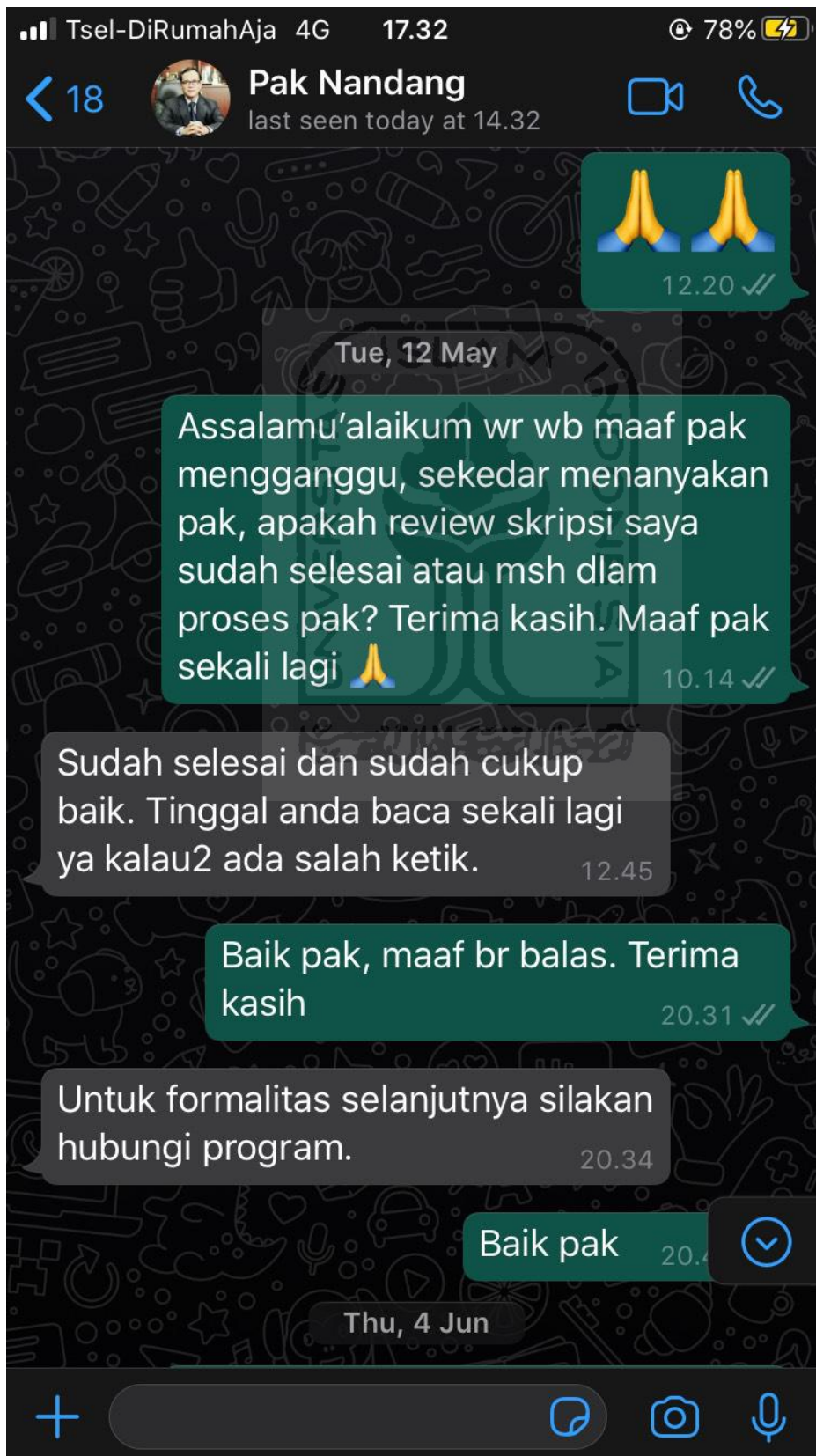
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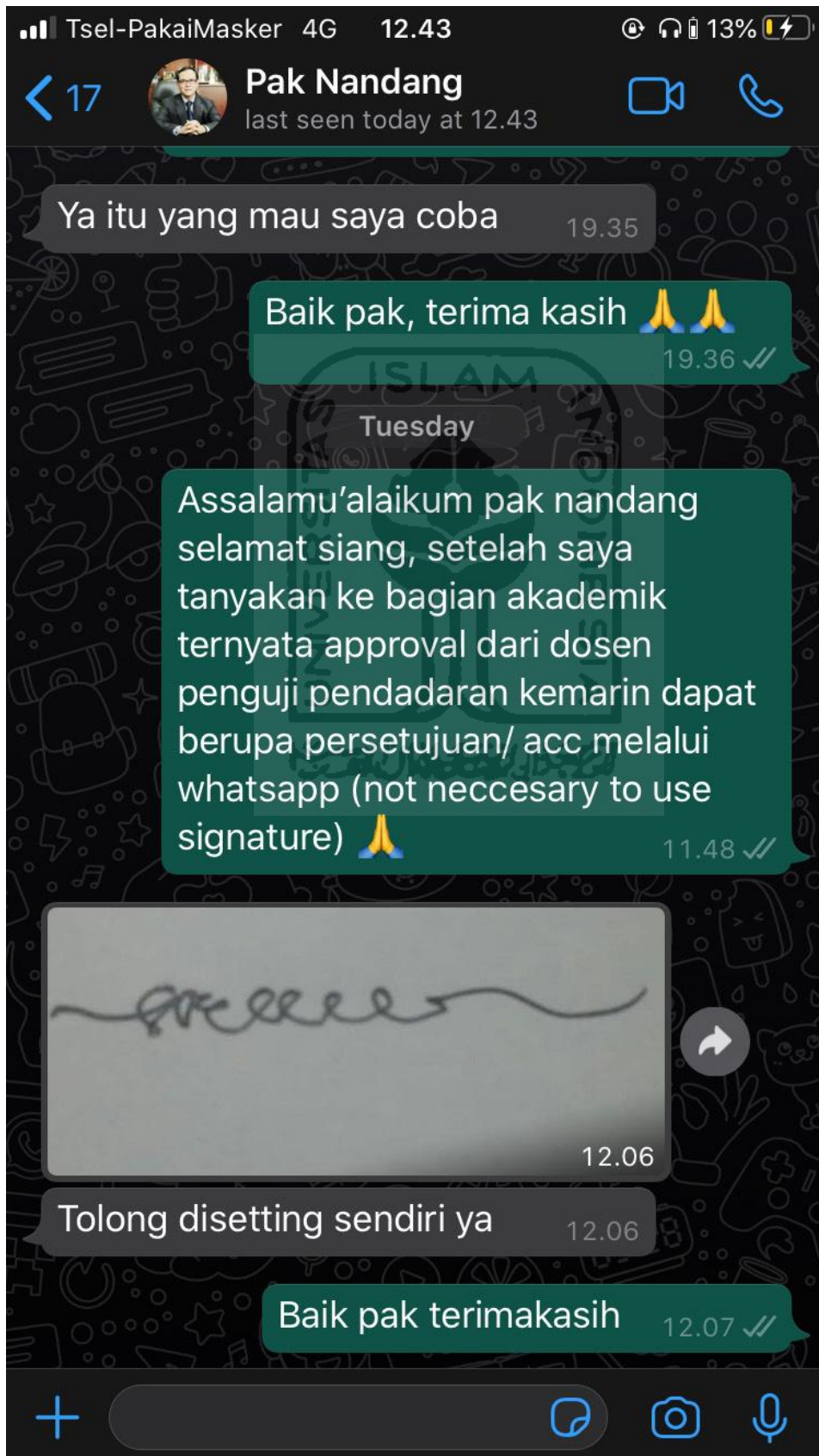
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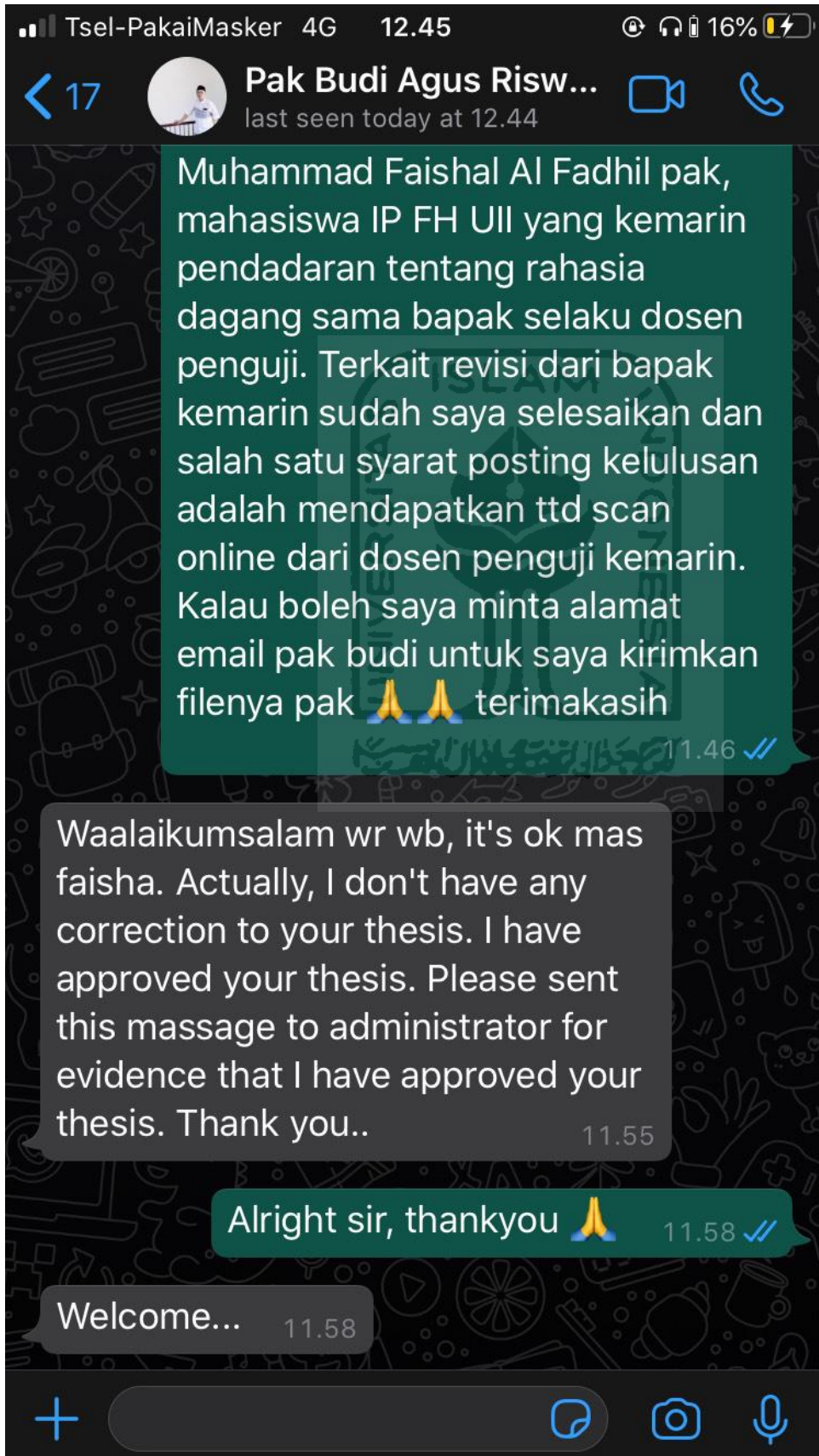


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